

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1484

To be argued by
A. Raymond Randolph, Jr.
or N. Richard Janis

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1484

UNITED STATES OF AMERICA,

Appellee,

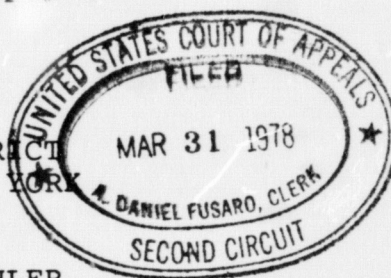
v.

ARNOLD NELSON MAHLER and
DEAN H. UBBEN,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ARNOLD NELSON MAHLER



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TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	v
Preliminary Statement	1
Statement of Facts	3
A. The Government's Case	4
B. The Defense Case	16
Argument	27
I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT MAHLER'S PRIOR CONVICTIONS	27
A. Introduction	27
B. The evidence regarding Mr. Mahler's prior convictions, introduced by the Government in its direct case, was so complex, con- fusing and prejudicial that the trial court should have been compelled to ex- clude it.	29
C. The trial court violated Rule 609(b), Fed. R. Evid., by allowing the government to use convictions more than ten years old for impeachment	36
II. THE PARTIALITY OF THE TRIAL COURT AND ITS ACTIONS CAST SUCH SERIOUS DOUBT ON THE FAIR- NESS OF THE TRIAL THAT THE CONVICTIONS MUST BE REVERSED	39
(1) The superseding indictment and pro- ceedings before trial.	43
(2) Conduct during the government's case	47
(3) Conduct during the defendant's case.	53
(4) Jury Instructions instructions.	62
Conclusion	67

TABLE OF CASES

	<u>Page</u>
<u>Albermarle Paper Co. v. Moody</u> , 422 U.S.	
405 (1975)	35
<u>Cupp v. Naughten</u> , 414 U.S. 941 (1973)	64
<u>Gordon v. United States</u> , 127 U.S. App. D.C.	
343, 383 F.2d 936 (1967)	38
<u>Krulewitch v. United States</u> , 336 U.S.	
440 (1949)	31
<u>McGill v. United States</u> , 121 U.S. App. D.C.	
179, 348 F.2d 791 (1965)	45
<u>Michelson v. United States</u> , 335 U.S.	
469 (1948)	29
<u>Nash v. United States</u> , 54 F.2d 1006 (2d	
Cir.), cert. denied, 285 U.S. 556 (1932).	31
<u>Quercia v. United States</u> , 289 U.S. 466 (1933).	41
<u>Russo v. Central School District No. 1</u> , 469	
F.2d 623 (2d Cir. 1972), cert. denied,	
411 U.S. 932 (1973)	38
<u>Shirley v. State of North Carolina</u> , 528 F.2d	
819 (4th Cir. 1975)	46
<u>State v. Santiago</u> , 492 P.2d 657 (Sup. Ct.	
Hawaii 1971)	30
<u>Ungar v. Sarafite</u> , 376 U.S. 575 (1964)	46
<u>United States v. Ah Kee Eng</u> , 421 F.2d 157	
(2d Cir. 1957)	41,42,53,66
<u>United States v. Bertolotti</u> , 529 F.2d 149	
(2d Cir. 1975)	46
<u>United States v. Birnbaum</u> , 373 F.2d 250 (2d	
Cir.), cert. denied, 389 U.S. 837 (1967).	64,65
<u>United States v. Brandt</u> , 196 F.2d 653 (2d	
Cir. 1952)	41,42,58,62,66
<u>United States v. Burr</u> , 25 F.Cas. 30	
(C.C. Va. 1807)	35
<u>United States v. Carpio</u> , 547 F.2d 491	
(9th Cir. 1976)	39
<u>United States v. Carter</u> , 516 F.2d 431	
(5th Cir. 1975)	33,34
<u>United States v. Cohen</u> , 544 F.2d 781	
(5th Cir. 1977)	38
<u>United States v. D'Anna</u> , 540 F.2d 1201	
(2d Cir. 1971)	40,41
<u>United States v. DeSisto</u> , 289 F.2d 833	
(2d Cir. 1961)	40,41,42,62,66
<u>United States v. Dwyer</u> , 539 F.2d 924	
(2d Cir. 1976)	36,39
<u>United States v. Fein</u> , 504 F.2d 1170	
(2d Cir. 1974)	45
<u>United States v. Grunberger</u> , 431 F.2d	
1062 (2d Cir. 1970)	40,41,42,61,62,66

Table of Cases (continued)

	<u>Page</u>
<u>United States v. Gugliemini</u> , 384 F.2d 602 (2d Cir. 1967)	40,42,61,66
<u>United States v. Kasauris</u> , 474 F.2d 689 (5th Cir. 1973)	31
<u>United States v. Leonard</u> , 524 F.2d 1076 (2d Cir. 1975)	31
<u>United States v. Light</u> , 394 F.2d 908 (2d Cir. 1968)	32,33
<u>United States v. Mahler</u> , 363 F.2d 673 (2d Cir. 1966)	31
<u>United States v. Mahone</u> , 537 F.2d 922 (7th Cir. 1976)	39
<u>United States v. Nazzaro</u> , 472 F.2d 302 (2d Cir. 1971)	40,41,42,50,51,53 54,56,61,62,66
<u>United States v. Park</u> , 421 U.S. 658 (1975)	64
<u>United States v. Puco</u> , 453 F.2d 539 (2d Cir. 1971)	30,31
<u>United States v. Robinson</u> , 174 U.S. App. D.C. 224, 530 F.2d 1076 (1976)	36
<u>United States v. Robinson</u> , 560 F.2d 507 (2d Cir. 1977)	36
<u>United States v. Rohm & Hass Co.</u> , 500 F.2d 167 (5th Cir. 1974), <u>cert. denied</u> , 411 U.S. 932 (1975)	38
<u>United States v. Smith</u> , 179 U.S. App. D.C. 162, 551 F.2d 348 (1976)	38,39
<u>United States v. Switzer</u> , 252 F.2d 139 (2d Cir.), <u>cert. denied</u> , 357 U.S. 922 (1958)	40
<u>United States v. Thorne</u> , 517 F.2d 57 (8th Cir. 1976)	39
<u>United States v. Weiss</u> , 491 F.2d 460 (2d Cir.) <u>cert. denied</u> , 419 U.S. 833 (1974)	41,42

STATUTES, LEGISLATIVE MATERIALS,
AND RULES

	Page
15 U.S.C. § 77(e)	2
15 U.S.C. § 77q(a)	2
15 U.S.C. § 77x	2
18 U.S.C. § 2	2
18 U.S.C. § 371	2
18 U.S.C. § 1001	2
18 U.S.C. § 1341	2
18 U.S.C. § 1343	2
Rule 10, Fed. R. App. Pro.	45
Rule 7, Fed. R. Crim. Pro.	45
Rule 12, Fed. R. Crim. Pro.	45
Rule 16, Fed. R. Crim. Pro.	45
Rule 30, Fed. R. Crim. Pro.	63
Rule 103, Fed. R. Evid.	46
Rule 104, Fed. R. Evid.	31
Rule 105, Fed. R. Evid.	35
Rule 403, Fed. R. Evid.	30, 34, 36
Rule 404, Fed. R. Evid.	29, 30
Rule 609, Fed. R. Evid.	27, 28, 30, 36, 37, 38
S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974)	38
H. R. Rep. No. 93-650, 93d Cong., 1st Sess. (1973)	38
120 Cong. Rec. 40891 (1974)	39

OTHER AUTHORITIES

Cal. Law Revision Comm'n, <u>Rep., Rec. and Studies</u> (1964)	29
Griswold, <u>The Long View</u> , 51 A.B.A.J. 1017 (1965)	29
Kalven & Zeisel, <u>The American Jury</u> (1966)	29
McCormick, <u>Evidence</u> (2d ed. 1972)	29, 34, 35
Weinstein & M. Berger, <u>Weinstein's Evidence</u> (1975)	34
Wigmore, <u>Evidence</u> (3d ed. 1940)	29, 34, 35, 36

Questions Presented

1. Whether the trial court's rulings allowing the government to use defendant's prior criminal convictions in its direct case and for impeachment violated Rule 403 of the Federal Rules of Evidence, in light of the confusing and prejudicial manner in which the convictions were brought to the jury's attention, and Rule 609 of the Federal Rules of Evidence, in light of the fact that the convictions were more than ten years old?

2. Whether the trial court's failure to act impartially during the pretrial proceedings, during the trial itself, and in deciding upon jury instructions, so affected the proceedings that defendant was denied a fair trial?

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BRIEF FOR APPELLANT ARNOLD NELSON MAHLER

Preliminary Statement

This is an appeal from a judgment of conviction entered
in the United States District Court for the Southern District of

New York (the Honorable Milton Pollack) on December 8, 1977 convicting defendant Arnold Nelson Mahler, after a jury verdict, of violating 15 U.S.C. §§ 77(e), 77q(a), 77x and 18 U.S.C. §§ 2, 371, 1001, 1341 and 1343 [R. Doc. 86].^{1/}

On November 11, 1976, an indictment (No. 76 Cr. 1047) was returned in the United States District Court for the Southern District of New York against appellant Mahler and nine others, charging various securities, wire and mail fraud offenses [R. Doc. 1, A. 14-34]. On April 11, 1977, the trial of eight of the defendants began before the Honorable Marvin E. Frankel. On May 25, 1977, the jury returned a verdict of not guilty on all counts as to three defendants; however when the jury resumed deliberations on the remaining defendants one of the jurors became ill and the court declared a mistrial on May 26, 1977.

Thereafter, the case was reassigned to the Honorable Milton Pollack who set the matter down for trial on October 3, 1977. On October 11, 1977, retrial of the two remaining defendants^{2/} commenced.^{3/} The trial ended on October 26, 1977, with

^{1/} Throughout this brief "R." refers to the official record in the District Court and "Doc." refers to the number of the document being cited. "A." refers to the appendix filed with appellant's brief.

^{2/} Three defendants at the first trial entered into plea agreements with the government before the second trial.

^{3/} The case was called for trial on October 3, 4 and 5 but the trial court was engaged in another trial. On October 5, 1977, (footnote continued on page 3)

a jury verdict finding both defendants guilty of all thirteen counts. On December 8, 1977, Judge Pollack sentenced defendant Mahler to twelve years' imprisonment. This appeal followed.^{4/}

Statement of Facts

A. The Government's Case

While the evidence as presented was extremely complex, the government essentially contended that Arnold Nelson Mahler and Dean H. Ubben were two of the central figures in a scheme to defraud the investing public through manipulation of the stock in a company known as Industries International, Inc., during

^{3/} (footnote continued from page 2)
a superseding indictment, No. S76 Cr. 1047, which had been filed on October 4, 1977, was served on the defendants and they were arraigned that same day [R. Doc. 1, A. 35-44]. Although this new indictment charged different substantive offenses and alleged different overt acts in furtherance of the conspiracy charged, defendant Mahler's requests, both oral (on October 6) and written (on October 7), for a continuance to enable him to file motions and/or prepare for trial on the new indictment were denied by the trial court. (See Oct. 6, 1977 Tr. 9-11) [R. Doc. 84, A. 51-55].

"Oct. 6, 1977 Tr." refers to the transcript of pretrial proceedings on October 6, 1977. Transcripts of other pretrial proceedings will also be referred to by the date, followed by references to particular pages. The transcript of the first trial [R. Doc. 53, 55-61, 63] will be cited as "Tr. I," followed by references to particular pages. The transcript of the second trial [R. Docs. 89-91] will be cited as "Tr. II," followed by page references.

The reporter misnumbered certain of the pages of the transcript of the second trial, denoting the page following 1499 as 1450 instead of 1500. Thus, there are two page 1450s and so on through page 1499. The second set of pages 1450-1499 are referred to as 1450A-1499A.

^{4/} Mr. Mahler is currently incarcerated, bond pending appeal having been denied.

late 1972 and early 1973.^{5/} As regards appellant Mahler, the government's two principal witnesses were Mr. Ted Zucker and Mr. Louis Kulekofsky.

Kulekofsky, who was the government's first witness, testified under a grant of immunity from prosecution (Tr. II 96). In the summer of 1972, Kulekofsky, who had his own financial consulting firm (Kule Resources Limited) first met Mr. Mahler,^{6/} although he had known Mahler's associate, Mr. Zucker, for a year or two prior to this time (Tr. II 100, 211, 214). Mahler and Zucker were then operating a merger and acquisition business, bringing together dormant public companies ("shells") with private companies that wished to offer stock to the public (Tr. II 105-106; see also Tr. II 1175-1178).

In the early fall of 1972, Zucker came to Kulekofsky with a proposition concerning a merger between a private company called HUP Industries and a public shell called M-Tech (Tr. II 106, 110). Zucker told Kulekofsky that if he would arrange for a stockbroker to get the stock of the newly formed company listed on the "pink sheets," Zucker and Mahler would give him \$1,000 in cash (Tr. II 107, 228).^{7/} Zucker gave Kulekofsky literature

^{5/} While the "Statement of Facts" presented in this brief is lengthy, we believe that it is necessary for the Court to understand the complex factual framework of this case in order to decide appellant's arguments on appeal.

^{6/} Kulekofsky knew appellant Arnold Nelson Mahler as Arnold Nelson (Tr. II 101). Mr. Mahler used both names (Tr. II 1330).

^{7/} As Kulekofsky explained, in order for a stock to begin trading on the over-the-counter market, a member of the National Association of Securities Dealers must complete a form and file it with the National Quotation Bureau. The National Quotation Bureau (footnote continued on page 5)

concerning HUP, including a proxy statement notifying shareholders of M-Tech of a special meeting (Tr. II 110).

Kulekofsky approached a friend of his, William Wellens, at the P.J. Stanton & Co. brokerage firm, and after the two had agreed to share any money Kulekofsky received from Zucker and Mahler, Wellens got his firm to go into the pink sheets on HUP (Tr. II 108-109, 224-225).

Kulekofsky met defendant Ubben, who Zucker had told him had been involved in the HUP deal, sometime around November of 1972 (Tr. II 112). Ubben had brought to Zucker and Mahler another company that was going to merge into a public shell, and Kulekofsky was going to be requested to get that stock trading as well (Tr. II 112). When Kulekofsky told Ubben that this company, United Growth Builders, looked like a good company Ubben told him that the next one was even better (Tr. II 113-114). The company Mr. Ubben was referring to was Industries International, which was the subject of the indictment in this case (Tr. II 114).^{8/}

^{7/} (footnote continued from page 4)
distributes to brokers on pink forms ("pink sheets") a listing of all over-the-counter securities with the name and phone number of the brokers making a market in the security and the price at which they are willing to buy and sell the stock. (Tr. II 107.)

^{8/} Like Kulekofsky, Zucker testified in some detail about these separate transactions which occurred before the transactions at issue in the indictment (Tr. II 776-779, as did Wellens (Tr. II 277-280), Harold Herman (Tr. II 367-369) and other witnesses (Tr. II 551-553, 676-682). Mr. Herman also testified about subsequent mergers (Tr. II 462-464; see also Tr. II 1453-1458, 1459-1461).

Thus, in late December of 1972, Zucker came to Kulekofsky with another proposition (Tr. II 115). The Industries International shell deal had just been completed, and once again Kulekofsky was asked by Zucker to arrange for a broker to get the stock trading (Tr. II 115, 223-224, 228, 793). Kulekofsky agreed, intending to have William Wellens at P.J. Stanton handle it (Tr. II 115-116). Again, Zucker gave Kulekofsky the proxy statement notifying shareholders of the public shell (Bell-Ko Film, Corp.) of the special shareholders' meeting regarding merger with the private company (International Industries) (Tr. II 115-117, 229).^{9/} This proxy statement would be submitted to the National Quotation Bureau along with the broker's application to get the stock traded (Tr. II 118). It was very much like that used in the HUP transaction and had been prepared by Zucker and Ubben while Mahler was out of the country (Tr. II 790-791, 838, 865-868). Zucker testified that Mahler approved it, but was not sure if he did so before or after it had been mailed out to the shareholders (Tr. II 791-793, 838, 869). Zucker also testified that the proxy statement failed to disclose certain material facts (Tr. II 791-793).^{10/}

Kulekofsky had originally been told he would receive \$1,000 if he got the stock of this new company trading, but after

^{9/} The new company was named Industries International, Inc.

^{10/} However, the attorney who supervised preparation of the proxy, Harold Herman, testified that he did not at the time believe that there was anything wrong with it and that there was no failure of disclosure (Tr. II 445-447).

a meeting (arranged by Zucker) in Kulekofsky's New York City office with representatives of the company in January, 1973, during which he saw a demonstration of the company's product (a pneumatic pump),^{11/} and learned that a large corporation had an interest in the product, Kulekofsky spoke with "Mr. Zucker and/or Mr. Mahler" and indicated he preferred to have stock in the company (Tr. II 118-119, 179). He was told if he could not get the stock from the company "they" would give it to him (Tr. II 119). Mr. Kulekofsky was, in fact, able to get the company to give him 50,000 shares of stock (which he would split with Wellens), in return for his services as a financial consultant (Tr. II 119-120, 793-794). Although the company and Kulekofsky entered into a written agreement, that agreement did not reveal that Kulekofsky had also agreed, as his end of the bargain, to get the stock traded (Tr. 120-121). One of the things Kulekofsky did for the company was to orchestrate a private meeting of stockbrokers in order to tout the stock, along the lines he had arranged previously for the United Growth Builders Company (Tr. II 122-124). Moreover, as promised, he got William Wellens to get the stock trading (Tr. II 128, 289-292).^{12/}

^{11/} Despite expressions to the contrary (e.g. Tr. II 11), the government clearly sought to convey the impression that the company and its product were both worthless (e.g. see Tr. II 9, 475-476, 689, 699-700). However, its own witness indicated otherwise. Kulekofsky, for example, testified about the interest in the product shown by one large corporation (Tr. II 119, 193-194, 229-230), and another government witness--a former associate of Ubben's--described the pump as "a beautiful piece of equipment" for which he had (3 years after the trading of stock involved in this case) paid \$50,000 to obtain marketing rights and another undisclosed sum to obtain manufacturing rights (Tr. II 720-722).

^{12/} Wellens also testified for the government, describing the actions he took to get the stock listed in the pink sheets, and (footnote continued on page 8)

Zucker explained that at the time of the merger there were originally 664,000 outstanding shares of Bell-Ko (the public shell), of which 200,000 were held by public shareholders and the remaining 464,000 were held by "insiders" as investment or restricted stock (Tr. II 784). Under former Rule 133 of the Securities and Exchange Commission, pursuant to which mergers of this type were permitted to take place without the filing of registration statements, the only shares that would automatically become available for free public trading after the merger were the 200,000 shares of unrestricted stock held by the Bell-Ko public shareholders, which would be converted to shares of the new company after the merger (Tr. II 784, 790). Of the remaining 464,000 shares of the old Bell-Ko stock, an insider named Marvin Greenberg held 40,000 shares, two other insiders held another 20,000 shares, Ubben was to have 180,000 shares, and Zucker and Mahler got the remaining 180,000 shares (Tr. II 785-787). None of these shares could be offered to the public after conversion to shares of the newly formed company however, unless they were "freed up" under an exemption to Rule 133, which permitted an insider to free up for sale one percent of the outstanding stock after the merger was consummated (Tr. II 794). Since there would be 4 million shares of the surviving company, Industries International, 1% was 40,000 shares (Tr. II 389, 783, 794).

In order to free up the shares an opinion letter from

12/ (footnote continued from page 7)
the various transactions he participated in (Tr. II 274-302). He conceded that whatever he learned about Mr. Mahler was hearsay from Kulekofsky (Tr. II 302-303). Furthermore, he conceded that Mr. Mahler never promised or gave him any stock or any money (Tr. II 304).

an attorney authorizing sale was required (Tr. II 794). Zucker testified that he and Mahler asked their attorney, Harold Herman, to write them such a letter, agreeing to pay him ten percent of the proceeds from the sale of the stock (Tr. II 794-795; see also Tr. II 377-380). Herman wrote the letter, but found that for purposes of this exemption Zucker and Mahler had to be treated as one and thus were entitled only to 20,000 shares each of freely tradeable stock (Tr. II 794-795). He also wrote an opinion letter to Mr. Greenberg, whom he had not met, authorizing him to free up 40,000 shares (Tr. II 380-381, 468, 795).^{13/}

^{13/} Herman testified that the opinion letters contained three restrictions on the sales of the stock to be freed up. First, the seller could not directly or indirectly solicit or arrange for the solicitation of orders and the shares had to be sold in connection with a normal brokerage transaction. Second, the seller could make no payment in such a transaction other than to the broker. Third, the securities sold during any six month period could not exceed 1% of the total of shares outstanding. (Tr. II 388-389.) The government contended that all three conditions were violated since the shares were sold in prearranged transactions, undisclosed payments were made to brokers to get the stock trading, and ultimately Zucker and Mahler sold more than 40,000 shares of stock (see Tr. II 388-389).

Mr. Herman also testified that he filed papers for the incorporation in Delaware of Industries International (Tr. II 369). He also testified that he prepared a false set of minutes purporting to be a board of directors meeting of International Industries in November, 1972, at which the reorganization with Bell-Ko Film was approved, although in fact no such meeting took place (Tr. II 370-371). Moreover, the waiver of that meeting signed by various International Industries board members was signed after the expiration of Rule 133 on December 31, 1972 (Tr. II 457-458).

On cross-examination, however, Herman conceded that Mahler had not asked him to backdate or prepare the false set of corporate minutes (Tr. II 403). Moreover, he testified that as for the opinion letter, Mahler had told him that he thought the Rule 133(d) exemption applied and had asked Herman to check it out -- which Herman in fact did, going so far as to telephone someone at the SEC to check his research (Tr. II 414-415).

Both Kulekofsky and Zucker testified about transactions regarding both the blocks of stock freed up by the opinion letters written by attorney Herman. As for the first block of stock, Kulekofsky testified that Zucker had told him that if he and Mahler could sell their stock, they would pay him \$5,000 in cash for arranging it (Tr. II 125). On February 28, 1973, the Industries International stock began trading (Tr. II 127). When Kulekofsky was told in a telephone call on March 1 from P. J. Stanton that the market was active and that they could use more stock, Kulekofsky called Zucker and Zucker told him that he and Mahler had 40,000 shares between them that they would be willing to sell (Tr. II 127, 236-237). Kulekofsky relayed this information to P. J. Stanton and then arranged to have Zucker's stock sold to P. J. Stanton through one brokerage firm and Mahler's stock sold to Stanton through another (Tr. II 127-128).^{14/} Kulekofsky testified that although he and Wellens were to have been given \$5,000 in cash for arranging the sales, Mahler changed the arrangement to reflect "some kind of formula" and

^{14/} The broker who handled the sale of Mahler's 20,000 shares was Harold Herman's brother, Bernard, Mr. Mahler agreeing to give the business to him as a favor to Harold (Tr. II 340-341). Bernard Herman testified that while the stock was restricted when the account was first opened up, trading was commenced after an opinion letter from Harold Herman freed up the stock (Tr. II 324-325, 342-343). He further testified that Mr. Mahler never asked him to sell the stock before it had been freed up, never directed him or anyone at his brokerage firm to sell the stock to P. J. Stanton or to any other particular brokerage firm, and never gave or offered him any cash or undisclosed payment (Tr. II 346-349, 351, 357). As far as his company was concerned the sales of Mahler's stock were all pursuant to normal brokerage transactions and only normal brokerage commissions were paid (Tr. II 356-357). Furthermore, Mahler's stock was sold to at least four different brokerage firms and was sold at about the same price as Industries International stock sold by Bernard Herman's firm for other customers (Tr. II 350-351, 354-356).

they ultimately received between \$10,000 and \$12,000 (Tr. II 131-132, 799A).^{15/}

Kukokofsky had been told by Zucker that Zucker and Mahler had also agreed to obtain a block of unrestricted (or freely tradeable) stock for Ubben, and Zucker asked Kulekofsky to arrange for the brokers to handle that transaction (Tr. II 125-126, 135, 235-236, 242, 780-782). Zucker had also told him that Ubben had been promised 40,000 shares of stock owned by a former "insider" of the corporate shell (Mr. Greenberg) at a price of one dollar a share (Tr. II 135, 796). Zucker told him that he and Mahler were going to buy those shares from Greenberg at fifty cents a share and sell them to Ubben for one dollar a share (Tr. II 135, 242). Again, Zucker asked Kulekofsky to arrange for the brokers to handle this transaction and, through William Wellens, Kulekofsky arranged for this stock to be placed at John Potter & Co. while Zucker and Mahler opened an account in the name of a corporation they controlled, Anted Vending, at the DuVest brokerage firm (Tr. II 135-137, 242-243).^{16/} The

^{15/} Zucker testified that Kulekofsky was to be paid everything over \$3 a share that Zucker and Mahler realized as a result of the sale (Tr. II 796). He also testified that he and Mahler each made about \$65,000 (apparently before paying Kulekofsky) from the sale of the stock (Tr. II 799A), and before paying Mr. Herman, who also received \$12,000 (Tr. II 385, 799A-800).

^{16/} Kulekofsky went so far as to pick up the stock certificates which Greenberg had delivered to Harold Herman and then have them delivered the next day to DuVest (Tr. II 136-138). While he met with Wellens, Zucker and Harold Herman, when he picked up the stock, Mahler was not present. (Tr. II 136-137, 243-244, 468-470, 585, 589).

shares were sold to Anted at fifty cents a share (Tr. II 138) but problems arose regarding the resale to Ubben. First, Kulekofsky and Wellens, who had made a deal with Ubben to get an additional 5000 shares of stock, decided to take their 5000 shares out of the 40,000 shares destined for Ubben (Tr. II 139). According to Kulekofsky, he told "Mr. Zucker and/or Mr. Mahler" of this arrangement and "they" agreed to advance him the money to purchase the stock (Tr. II 139, 807). Second, the market had risen considerably and a sale of so large a block of shares at one dollar a share would have raised a red flag; thus, the sale would have to be consummated at a higher price (Tr. II 139-140, 800-801). Zucker agreed, telling Kulekofsky that it would not cost Ubben anything extra since whatever he paid above one dollar would be given back to him (Tr. II 140). Thus, at Kulekofsky's direction, DuVest sold 5000 shares at \$3.50 a share on March 7 from Anted Vending's account to Kulekofsky's account at P. J. Stanton (Tr. II 142), and the remaining 35,000 shares were sold that same day at \$2.00 a share to a bank in Des Moines, Iowa, for Ubben (Tr. II 141-142).

That same day, March 7, 1973, Wellens called Kulekofsky to inform him that the SEC had been to P. J. Stanton inquiring about Industries International (Tr. II 142-143). Kulekofsky testified that he called Zucker^{17/} and then met with Zucker and Mahler that night at about 6:00 or 7:00 p.m. at their office on Long Island (Tr. II 143, 802-803, 885). There they discussed a

^{17/} Zucker testified that he in turn called attorney Herman to find out if they had done anything improper, and Herman told him he would think about it and call him back. When he did call Zucker back he said the laws had been violated (Tr. II 905-906).

plan to cover-up the true nature of the purchase and sale of the stock by Anted Vending by replacing and backdating records so that it would appear that a friend of Zucker's, Michael Sichel, acted on Anted's behalf and had on his own ordered the purchase and sale of the stock (Tr. II 143-144, 803-804, 886-888, 994-997). Subsequently, Kulekofsky arranged to have the old forms removed from the DuVest files and new forms -- which he prepared, backdated, and had Sichel sign in Zucker's and Mahler's presence -- substituted in their place (Tr. II 144-145, 804-806, 997-999).

According to Kulekofsky, on March 13, 1973, he met with Zucker and Mahler to obtain the money he had been promised and which he needed the next day to pay for the 5000 shares of stock he had purchased (Tr. II 142, 146-147, 253). He claimed that Mahler argued with him and said he was not going to pay it since "he got in trouble last time for paying off a broker and wasn't going to pay me this time for it" (Tr. II 147; see also Tr. II 270).^{18/} Zucker took up for Kulekofsky and, in Mahler's presence, gave him \$8,500 in cash (Tr. II 147, 253). Arrangements were then made for Kulekofsky's wife to receive the balance of the money on March 15, and on that date Zucker met her at the bank and gave her \$9,500 to deposit (Tr. II 148, 254).^{19/} Zucker told Kulekofsky that the money due Ubben, for the difference between the price he paid for his stock and the purchase price he was promised, had been paid to Ubben at Zucker's direction through the purported purchase from Ubben of HUP stock by a

^{18/} See Argument I, infra.

^{19/} Significantly, Zucker testified that there were two meetings on March 7, not one (Tr. II 807). Moreover, he testified that he gave Kulekofsky \$4000 in cash not \$8,500 (Tr. II 807-808).

company Zucker owned called Jefferson Retread (Tr. II 150-151, 912-915).^{20/}

Kulekofsky admitted that after he had been subpoenaed by the SEC in connection with its investigation of Industries International, he told many lies under oath (Tr. II 153) and that he had perjured himself on one material fact after another (Tr. II 176, 183, 186, 189, 206-208, 210-211, 225, 265). He also admitted that as a result of his deal with the government he had never been charged or indicted for any criminal offense (Tr. II 205, 210-211). Kulekofsky conceded (as did Zucker) that during the period in question Mahler was frequently out of town or out of the country (Tr. II 217, 869, 874, 910-911, 941, 951-952) and that Mahler was not a party to Kulekofsky's arrangements with the company for stock (Tr. II 234, 241) and was not present at a meeting Kulekofsky arranged to cover-up the substitution of Sichel's name on the Anted records (Tr. II 248-249, 272). Moreover, he conceded that throughout the events in question 90% or more of his conversations were with Zucker rather than Mahler (Tr. II 246-247), and that after Zucker and Mahler parted ways (within weeks of the Industries International stock sales) Kulekofsky continued his contact with Zucker and had further business dealings with him, including other shell deals (Tr. II 257-260). Indeed, Kulekofsky was still in the merger and acquisition business at the time of trial (Tr. II 202).

^{20/} Zucker claimed that Mahler still had an interest in Jefferson Retread at the time the payment was made to Mr. Ubben (Tr. II 808-811).

On cross-examination Zucker conceded that he had made a deal with the government in return for his testimony against Mr. Mahler,^{21/} and that his sentencing date had been postponed until after the trial (Tr. II 813-817).^{22/} He admitted that he had violated an SEC civil injunction entered against him (Tr. II 817-822). He further admitted that he continued to do business with Kulekofsky and Harold Herman^{23/} after the Industries International transaction, and that he and Kulekofsky at times shared offices as they worked on further shell deals (Tr. II 824-828; see also Tr. II 587, 593-594). In these new deals, Kulekofsky "took over Mr. [Mahler's] role" (Tr. II 827). Furthermore, as regards the HUP transaction, he conceded that the only stock he and Mahler ever received was investment stock and that neither of them ever sold any of that stock (Tr. II 850- 851). He admitted that Sichel, who signed the falsified Anted account forms prepared by Kulekofsky, was still a friend and business associate of his (Tr. II 888).^{24/} Indeed, Zucker admitted that he had paid Sichel more than \$100,000 in the three to four years before the

^{21/} Zucker made his deal with the government after Kulekofsky had already obtained immunity and was thus required to plead guilty to one count of conspiracy and one count of stock fraud (Tr. II 205, 260, 771-772, 814).

^{22/} Zucker was sentenced on December 20, 1977, by the Honorable Whitman Knapp to 90 days' incarceration followed by probation. As we noted (p. 3, *supra*), Mr. Mahler was sentenced by Judge Pollack to twelve years' imprisonment.

^{23/} Mr. Herman, who had pleaded guilty to two counts of aiding and abetting the sale of unregistered stock (Tr. II 361), was sentenced on December 14, 1977, by the Honorable Irving Ben Cooper to one day probation.

^{24/} Sichel, who also testified for the government, was not charged in the case, although he admittedly signed false documents (Tr. II 1002-1003).

trial (Tr. II 888).^{25/} Moreover, in the face of his assertion that Mahler was present at the cover-up meeting with he and Kulekofsky on the night the SEC had gone to P. J. Stanton and made inquiries about the trading of Industries International, Zucker was confronted with the prosecutor's detailed notes of his interview with Zucker indicating only that Zucker and Kulekofsky were present (Tr. II 892-898).

The case against Ubben, which is more fully set out in the brief filed on his behalf, was based on the contentions that he obtained and submitted false and misleading financial statements, fraudulently touted the stock of Industries International to various prospective investors in the Midwest United States, participated in prearranged sales of stock, forged documents and used without authorization various nominee names to hide the true extent of his holdings in Industries International.

B. The Defense Case

Mr. Mahler contended in defense that he was unaware of and did not participate in any illegal aspects of the Bell-Ko/International Industries merger and that any wrongdoing was orchestrated by Zucker and Kulekofsky, who were the two persons responsible for consummating the merger at a time when Mahler was frequently out of the country.

^{25/} Sichel testified that the nature of his business relationship with Zucker was work together on mergers and acquisitions, conceded that it included falsely labeled financial transactions and transfer of funds between their respective companies, and indeed that after the Industries International transaction he continued to act as a nominee for Zucker in other transactions (Tr. II 1004-1110; see also Tr. II 1217-1220).

Mr. Mahler's first, and probably most important, witness was Charles J. Hecht. Mr. Hecht was a former staff attorney for the Division of Corporate Finance of the SEC in Washington, D.C., who was engaged in the private practice of law specializing in securities, commodities and corporate work (Tr. II 1170-1171). He had published a number of articles and been a lecturer in the field of mergers and acquisitions and securities laws (Tr. II 1171). Hecht met Mahler at the end of 1971 or the beginning of 1972 and thereafter represented his merger and acquisition business until October of 1972 (Tr. II 1172). Hecht detailed the type of work involved in corporate reorganizations, explaining some of the requirements imposed by the SEC (Tr. II 1175-1179). In particular, he discussed exemptions from the normal requirements of registration before a company could make a public offering, including the Rule 133 exemption (Tr. II 1178-1179). That rule provided a commonly used exemption in 1972 for going public and had been used by many companies, since it provided an alternative to the more expensive and time-consuming process required in filing with the SEC (Tr. II 1179-1181).^{26/} The Rule 133 process also provided shareholders of the dormant public company an opportunity to recoup their losses or even make a profit if the new company did well (Tr. II 1231-1232).^{27/}

^{26/} Mr. Hecht cited Gulf & Western and Boise Cascade as two major corporations that went public by purchasing a shell under Rule 133 (Tr. II 1181).

^{27/} Indeed, one such shareholder of Bell-Ko stock testified on Mr. Mahler's behalf that having given up on his Bell-Ko stock he was delighted when he received notice of the merger with International Industries (he sent in his proxy voting for it) and that he sold his converted stock over a period of weeks in a number of sales, realizing a profit of some \$92,000 (Tr. II 1298-1308). He did not know and had never heard of Mr. Mahler, had no inside

(footnote continued on page 18)

At the time Hecht first began to represent Mahler, Zucker was not associated with Mahler's merger and acquisition business (Tr. II 1181). When potential acquisitions would come in, Hecht would review them, get the necessary information from the privately held company, review the books and records of the dormant public company, prepare the proxy statement to be used at the meeting for shareholders, and then hold a shareholders meeting (Tr. II 1181-1182). Before going ahead with a merger or acquisition Hecht and Mahler would undertake an investigation to verify the facts contained in the company's financial statements as well as the membership of its board of directors and its sales and invoices (Tr. II 1182-1183). Together, Hecht and Mahler developed checklists based on SEC requirements and restrictions, which they were careful to follow, and Hecht would instruct Mahler on specific items to verify regarding the information furnished to them by the companies (Tr. II 1183, 1185-1186). Hecht found Mahler to be extremely careful and noted that on a number of occasions when the information could not be verified he advised Mahler not to go through with the deal, and Mahler followed his advice (Tr. II 1182-1184).

Around the late summer of 1972 Mahler told Hecht that he had made a "life decision" to end his breakneck work routine and to spend more time with his family (Tr. II 1186-1187). He told Hecht that he felt that he could trust Zucker to operate his business (Tr. II 1187).

27/ (footnote continued from page 17)
information and had no trouble selling the stock -- all of which was sold without prearrangement after normal brokerage transactions (Tr. II 1307-1310).

Hecht himself did not trust Zucker (Tr. II 1192). He had first met Zucker in the late spring of 1972 when he was a finder who had brought a business transaction to Mahler (Tr. II 1187). At first Zucker helped Mahler with a few transactions, but then he took on a more active role, taking on more and more responsibilities as Mahler started to phase out of the business pursuant to his life decision to slow down (Tr. II 1187-1188). As Zucker had more and more dealings with Hecht, Hecht asked Zucker if he had had prior troubles with the SEC and Zucker replied that he had not (Tr. II 1188-1189). However, when Hecht checked on this with the SEC, he discovered that Zucker had not been truthful and that an injunction had been entered against him (Tr. II 1189-1190).^{28/}

In view of Zucker's demonstrated willingness to take shortcuts with Hecht and his failure to verify important information, and after Hecht had looked over the consent injunction and pertinent papers against Zucker at the SEC, Hecht told Mahler that he did not trust Zucker and that if Mahler wanted to keep Zucker in the business he would have to get another attorney (Tr. II 1189-1193). Mahler told Hecht that he wanted Hecht to stay but that he wanted to take off more time, that he had broken Zucker in and he felt that he could trust him and that Zucker could use the files that he and Hecht had developed to capably handle the job (Tr. II 1193). Thus, in October of 1972, Mr.

^{28/} In contrast, before Hecht agreed to represent Mahler, he asked Mahler if he had had any prior troubles with the SEC and Mahler told him about his prior SEC civil injunction as well as about his prior criminal convictions (Tr. II 1173, 1198-1200).

Hecht discontinued his representation of Mahler's business, which had been his biggest client, and he had nothing to do with the HUP or Industries International mergers (Tr. II 1193-1194, 1224-1225).^{29/}

The jury already having been fully -- and repeatedly -- advised by the government of Mr. Mahler's prior criminal record (e.g., see Tr. II 16, 20, 147, 152, 270, 740-764), Mr. Mahler took the stand in his own behalf. After recounting in some detail his own background and the circumstances under which Zucker became his business associate, as well as his relationship with Mr. Hecht and his ultimate choice of Zucker over Hecht (Tr. II 1315-1329), Mr. Mahler discussed the operations of his merger and acquisition business and the specific allegations made against him in the government's case.

As to the HUP merger, Mr. Mahler testified that he purchased 100,000 shares of restricted stock in HUP, none of which he ever sold, and all of which was worthless (Tr. II 1335-1336). He never received any freely tradeable stock, and ultimately cleared about \$7,500 in the deal (Tr. II 1336).^{30/}

^{29/} Hecht did agree to represent Mahler in a civil suit against Zucker in 1975, during the course of which he heard Zucker on two occasions tell Mahler that he would use the Industries International trial to "get even" with Mahler (Tr. II 1194-1197).

Throughout Mr. Hecht's important testimony, the trial court continually -- and often discourteously -- interrupted, intervened and challenged the witness, prompting counsel for appellant Mahler to object and to move (unsuccessfully) for a mistrial (Tr. II 1237-1238, 1241-1244). See Argument II, *infra*.

^{30/} Mr. Mahler explained that his merger and acquisition company customarily charged a fee of between \$20,000 and \$30,000 for public reorganizations, some of which went to defray costs (Tr. II 1332-1333, 1350). It also obtained a substantial block of investment (restricted) stock in the hope that if the company proved to be successful that stock would be valuable (Tr. II 1350). As noted, the HUP stock Mahler purchased proved to be worthless (Tr. II 1336).

Moreover, he never discussed with Kulekofsky his getting someone to go into the pink sheets on HUP (Tr. II 1342), nor did he know anything about the alleged offer from Mr. Ubben to Kulekofsky of 5000 shares of stock to get the stock trading (Tr. II 1344).^{31/} His ownership of the 100,000 shares of HUP gave him less than 5% of the surviving company, and he was not an officer or director of nor did he have control over management decisions concerning that company (Tr. II 1338, 1341-1342). Thus, there was nothing improper in the omission of his name from the proxy statement regarding the HUP merger, a proxy statement he had assisted in preparing (Tr. II 1337-1338, 1341-1342).

By the time of the HUP transaction, Zucker had taken on substantial responsibility (Tr. II 1345). In July of 1972, Zucker told Mahler that he was trying to acquire the controlling block of stock in a dormant public company called Bell-Ko Film (Tr. II 1346). In August Zucker told him that he had completed acquiring control of Bell-Ko and that Mahler's portion of the acquired stock was 112,000 shares (Tr. II 1348). Thus, when Ubben asked Mahler in October of 1972 if he would be interested in handling a corporate reorganization for a private company called International Industries, Mahler had the corporate shell necessary to consummate the merger (Tr. II 1352-1353). Although Mahler did have initial discussions with Ubben later that month, actual

^{31/} In fact, as Mr. Mahler explained, brokers were anxious to trade companies that had just completed a merger or reorganization since they earned their money when they conducted trading, and they could also make the difference between the price at which the stock was bid and that at which it was offered (Tr. II 1343). Thus, any number of brokers would have been anxious to trade the stock (Tr. II 1343-1344).

arrangements were not begun in earnest until after his merger and acquisition company received an initial deposit of \$10,000 on the customary \$25,000 fee (Tr. II 1353-1360). At the time this fee was received Mahler was out of the country (Tr. II 1361; see also Tr. II 789-790). Moreover, Zucker and Ubben prepared the proxy in Mr. Mahler's absence (Tr. II 1361, 1363). Furthermore, while the government contended that that proxy statement failed to reveal Mr. Mahler's status as a control person, at the time the proxy statement was filed Mahler owned substantially less than 10% of the stock of the surviving company and was not an officer or director of nor did he exercise control over management decisions concerning the company (Tr. II 1341-1342, 1363-1366).

Mr. Mahler never touted or helped anyone to tout the stock of Industries International; he did not seek to attract investors or raise capital for the company; and he never traveled to the Midwest or other parts of the United States on its behalf (Tr. II 1366- 1371). He was not a party to nor aware of any discussions with Kulekofsky regarding payments for getting the stock trading and he did not know that Kulekofsky was to receive 50,000 shares of stock for performing services for Industries International (Tr. II 1369-1370).

In 1973 Mr. Mahler sought to free up some of the shares he owned in Industries International, all of which were restricted (Tr. II 1371-1372). When he asked Harold Herman if he could write an opinion letter for an exemption under Rule 133(d), Herman told him that he would be entitled to such a letter but

that for purposes of the 1% limitation, Mahler and Zucker would have to be treated as one person; thus, they could free up only 20,000 shares each (Tr. II 1371-1373). Mahler abided by this requirement and in fact freed up only 20,000 of the converted 112,000 shares Zucker had acquired for him from Bell-Ko (Tr. II 1372-1374). Those 20,000 shares were the only shares of Industries International that Mr. Mahler ever sold; at the time of trial he still owned the rest of his shares (Tr. II 1374-1376, 1379).^{32/}

As for the 40,000 shares of stock bought from Marvin Greenberg and then sold, ultimately, to Ubben, Mahler did not know that Zucker had made arrangements with DuVest to buy this stock for the account of Anted Vending at a prearranged price, and he had nothing to do with -- indeed, had no knowledge of -- its resale (Tr. II 1380-1382, 1394).^{33/} He had never made any deal with Ubben to provide him with 40,000 shares of freely tradeable stock (Tr. II 1382). Mr. Mahler, who arrived in Greece with his wife on March 15, 1973, did not know that Zucker had

^{32/} The 20,000 shares which were sold were sold without any direction by Mr. Mahler as to whom the stock should be sold, and the stock was in fact purchased by a number of brokerage firms (Tr. II 1377-1379).

^{33/} Mr. Michael Dutzar, who in 1973 was the President of DuVest, testified that it was Kulekofsky who asked him to purchase Industries International for Anted Vending in prearranged transactions (Tr. II 1282-1286). Moreover, he attended a meeting with Kulekofsky, Zucker and Sichel in late March of 1973 to cover-up the fact that it was actually Zucker, not Sichel, who had placed the order for Anted Vending (Tr. II 1287-1290). Mr. Mahler was not at that meeting and Dutzar had not met and had no contact with Mr. Mahler (Tr. II 1287-1288, 1291-1292). Based upon the advice given him by Kulekofsky, Dutzar testified falsely before the SEC; he later pleaded guilty to that offense (Tr. II 1288, 1293).

transferred funds from Anted Vending to Jefferson Retread on March 16, nor did he know that on March 13 Zucker had written himself a check to be used to obtain cash to pay Kulekofsky's wife (Tr. II 1383-1385; see also Tr. II 910-911). When Mahler phoned his office from Greece on March 22, 1973, three days before returning to the United States, he was told by Zucker for the first time that he had given Kulekofsky cash for "arrangements" Kulekofsky had made at Zucker's request in the Industries International deal (Tr. II 1385-1387). Mahler told Zucker that that could not be done and directed Zucker to get it back from Kulekofsky (Tr. II 1387).^{34/} When Mahler returned home and was given an analysis by Zucker of what he had done through Anted Vending, Mahler fired him on the spot (Tr. II 1389). Mahler had nothing to do with the April 3, 1973 payment at Zucker's direction of \$30,000 to Ubben from Jefferson Retread, a company in which Mahler no longer had an interest on that date (Tr. II 1390-1392).^{35/}

^{34/} This testimony was corroborated by Mr. Mahler's wife, who testified that on March 22, 1973, while she and Mr. Mahler were in Greece, Mr. Mahler called his office and while on the phone with Zucker got very upset, saying "What do you mean? What did you do? What do you mean you paid a broker? What are you talking about?" (Tr. II 1488-1489.) She also testified that Mr. Mahler was angry at Zucker and told him what he had done was illegal and that he should get the money back (Tr. II 1489).

^{35/} Mr. Nathan Brodsky, who was a principal of Jefferson Retread and who ran the business' day-to-day operations, testified as a defense witness that this check for \$30,000 was written by him at Zucker's direction and that Zucker had told him to put the notation "For purchase of 40,000 shares of HUP Industries, Inc." on it (Tr. II 1249, 1251-1252, 1263-1265). He also testified that Zucker handled the finances of the company and that while he only saw Mahler three times (all before mid-March, 1973) he saw Zucker constantly since Zucker was frequently at the place of business and even shared an office there, and since Zucker handled all the finances and directed Brodsky to sign checks (Tr. II 1252-
(footnote continued on page 25)

Mr. Mahler also testified that he did not, as Kulekofsky and Zucker had claimed, attend a cover-up meeting with them on the evening of March 7, 1973, the day on which the SEC began its inquiries into the trading of Industries International (Tr. 1392-1394). Likewise, he had nothing to do with the substitution of Sichel's name on the DuVest account card for Anted Vending and did not know at the time that Zucker had, through Kulekofsky, worked a prearranged sale (Tr. II 1393-1394). Indeed, on the evening of March 7, Mr. Mahler had been out with his wife and family celebrating the birthday of his eldest child.^{36/}

On cross-examination the prosecutor sought to impeach Mr. Mahler with various alleged inconsistent or inaccurate statements (e.g. see Tr. II 1416-1420). The prosecutor also spent substantial time confronting -- improperly, we submit (see Argument I, infra) -- Mr. Mahler about his prior criminal record (Tr. II 1421-1427), about his life-style (Tr. II 1415; see also

^{35/} (footnote continued from page 24)
1254, 1258-1260). Moreover, he testified that Mahler's interest in the company, which began on March 7, 1973, when Mr. Brodsky entered into a signed agreement with Mahler and Zucker, was terminated in the latter part of March or the early part of April (Tr. II 1253-1254, 1262). Mr. Brodsky also testified concerning Mr. Zucker's lack of honesty, truthfulness and business ethics, and noted that Zucker used Kulekofsky's offices as his own well after March of 1973 (Tr. II 1260-1261, 1267-1270).

^{36/} Both Mr. and Mrs. Mahler testified that, without fail, they took their children out to dinner each time one of them had a birthday (Tr. II 1392-1393, 1484-1485). Their son David was nine years old that evening (as was evidenced by his birth certificate, which was received in evidence) and Mr. and Mrs. Mahler and their three children spent the evening together (Tr. II 1392-1393, 1485-1486). While Kulekofsky had testified that the cover-up meeting took place at about 6:00 - 7:00 p.m. (Tr. II 143), Mrs. Mahler testified that the family left for dinner at about 5:30 or 6:00 p.m. and got home at around 9:00 p.m. (Tr. II 1487).

Tr. II 1492) and about HUP (Tr. II 1431-1435), as well as about transactions that took place after the Industries International merger (Tr. II 1453-1458, 1459-1461).^{37/}

^{37/} For example, over strenuous objection by defense counsel, the trial court permitted the prosecutor to confront and seek to impeach Mr. Mahler with inaudible statements allegedly made on an unauthenticated tape recording purportedly prepared by a man who at the time of trial was deceased, concerning an unrelated transaction occurring after the events at issue at trial (Tr. II 1453-1458). The trial court also ruled that this extrinsic evidence could be presented by the government to the jury, but conceded that it had to be authenticated first (Tr. II 1466-1469, 1496-1499). No witness was ever called by the government to authenticate the tapes and the tapes themselves were not played to the jury, but of course the damage to Mr. Mahler had already been done.

In contrast, the trial court denied Mr. Mahler the opportunity to present to the jury certain tape recordings, which were government exhibits (and which the government had itself introduced into evidence at the first trial), between Zucker and Greenberg showing that it was with Zucker and not with Mahler that Greenberg made arrangements for acquisition of the Bell-Ko shell (Tr. II 1165-1167, 1244-1246, 1496-1499, 1451A-1454A, 1566-1575); see Court Exhibit 6 [R. Doc. 97].

ARGUMENT

I.

THE TRIAL OF DEFENDANT MAHLER'S CREDIBILITY IN ADMITTING EVIDENCE OF DEFENDANT MAHLER'S PRIOR CONVICTIONS

A. Introduction

Prior to the first trial before Judge Frankel, the government indicated that it intended to introduce evidence of defendant Mahler's previous convictions for the purpose of impeaching his credibility (March 23, 1977 Tr. 10-12) [R. Doc. 54]. The convictions themselves were more than ten years old, having occurred in 1965 and 1966, *id.* at 11, and Judge Frankel initially stated that "considering the nature of this case and the age of the convictions I would be disposed to bar the Government from using them to impeach." *Id.* at 11. Shortly before trial in April 1977, however, Judge Frankel ruled that because Mr. Mahler's last date of confinement was June 1967, the bar against using such evidence after ten years (See Rule 609(b), Fed. R. Evid.) had not yet come into effect and that the government was correct in arguing that the court therefore had no discretion to exclude the prior convictions.^{38/} But the impeaching evidence was never

^{33/} April 11, 1977 Tr. 42-43 [R. Doc. 53]. Judge Frankel added that even if he had discretion to exclude prior convictions not barred by the ten-year limit in Rule 609(b), he would allow the government to use the evidence for impeachment. *Ibid.* Contrary to the government's statement to Judge Pollack, Judge Frankel did not decide whether the evidence would have been admissible if the ten-year limit of Rule 609(b) had been in effect. See Government's Memorandum of Law Respecting the Admissibility of Certain Similar Act and Impeachment Evidence 36-37 (Sept. 26, 1977).

introduced because Mr. Mahler did not take the stand in the first trial.^{39/}

By the time of the retrial in October 1977 before Judge Pollack, however, the situation had significantly changed. More than ten years had elapsed since Mr. Mahler's release from confinement in June 1967 and the Rule 609(b) bar against the use of prior convictions was clearly applicable. Recognizing this, the government devised a new theory for getting Mahler's criminal record before the jury: this time, in addition to seeking to use the prior convictions for impeachment, it sought to introduce evidence regarding these convictions as proof of prior similar acts in its case-in-chief. The trial court's rulings permitting this evidence to be so used in the government's direct case and to be used for impeachment when Mr. Mahler took the stand constituted, we submit, reversible error.^{40/}

^{39/} As to whether Mr. Mahler would testify on his own behalf, Mr. Mahler's counsel had advised Judge Frankel, after his ruling on the prior convictions, that "I expect that he will, but, obviously, I can't predict with absolute certainty " (April 11, 1977 Tr. 44).

^{40/} Prior to the second trial, Mr. Mahler filed written motions with Judge Pollack to preclude use of the prior convictions in the government's direct case or for impeachment. Judge Pollack denied both motions by written notation on October 8, 1977. With respect to substantive use of the convictions, Judge Pollack ruled that Mr. Mahler's motion was anticipatory and "wanting in merit at all events." With respect to impeachment use, Judge Pollack ruled that "this motion was considered and rejected at the previous trial and there are no new facts which warrant any changes in the ruling." As we discuss in the text, however, a critical new fact did warrant a change in the prior ruling: 10 years had elapsed from Mr. Mahler's release from confinement. See October 8, 1977, Memo. Endorsed on Mr. Mahler's Motion to Grant an Order Precluding the Government from Introducing Prior Convictions in their Direct Case [R. Doc. 82, A. 47-48]; October 8, 1977, Memo. Endorsed on Mr. Mahler's Motion to Grant an Order Precluding the Government from the Use of Prior Convictions for Impeachment. [R. Doc. 83, A. 49-50]. See also R. Docs. 71, 73.

- B. The Evidence Regarding Mr. Mahler's Prior Convictions, Introduced by the Government in Its Direct Case, Was So Complex, Confusing and Prejudicial That the Trial Court Should Have Been Compelled to Exclude It.

It is the law in virtually all states and in the federal courts under Rule 404(b), Fed. R. Evid., that evidence of prior convictions may not be admitted for the purpose of showing that the defendant has a criminal propensity and is likely to have committed the crimes charged. Michelson v. United States, 335 U.S. 469, 475-476 (1948). The dangers associated with this type of evidence, particularly when it relates to the accused, are severe and inevitable. Such evidence is, as the Advisory Committee on the Federal Rules of Evidence recognized, "'of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.'"^{41/} Moreover, evidence of the accused's prior criminal convictions may induce the jury to believe that he "ought to be put away without too much concern with present guilt."^{42/}

^{41/} Advisory Committee Note to Rule 404, Federal Rules of Evidence, quoting from Cal. Law Revision Comm'n, Rep., Rec. & Studies 615 (1964). See also Griswold, The Long View, 51 A.B.A.J. 1017, 1021 (1965).

^{42/} McCormick on Evidence 89 (2d ed. 1972), citing statistical support in Kalven & Zeisel, The American Jury, 124, 126-130, 144-146, 160-162 (1966).

Despite these dangers, evidence of a defendant's prior crimes may be admissible under the Federal Rules of Evidence for purposes other than showing criminal propensity, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (Rule 404(b), Fed. R. Evid.), or for impeachment (Rule 609, Fed. R. Evid.). In these situations the evidence still has a substantial tendency to cause the kind of prejudice described above, see United States v. Puco, 453 F.2d 539, 542 (2d Cir. 1971), but in a particular case the probative value of the evidence may be such that it justifies subjecting the defendant to the grave risks accompanying this proof. That, at least, is the theory underlying the Federal Rules of Evidence. See Rules 403, 404(b), 609, Fed. R. Evid.^{43/}

In this case, before the government introduced (over objection^{44/}) evidence of defendant Mahler's previous convictions, the trial court informed the jury that it was about to receive evidence "concerning prior criminal convictions of Mr. Mahler in stock fraud cases bearing substantial similarity to the alleged conduct indicted in this case." (Tr. II 740) [A. 122]. After thus usurping the jury's fact-finding role by proclaiming that the prior crimes were in fact substantially similar,^{45/} the court

^{43/} But see State v. Santiago, 492 P.2d 657, 660-661 (Sup. Ct. Hawaii 1971), holding that under the Fourteenth Amendment to the Constitution evidence of prior crimes may never be introduced to impeach the credibility of a defendant.

^{44/} Tr. II 664.

^{45/} Similarity is to be judged by "the degree in which the prior act approaches near identity with the elements of the offense (footnote continued on page 31)

concluded this supposed "cautionary" instruction by asking the jury to perform -- as Judge Learned Hand put it -- "a mental gymnastic which is beyond, not only their power, but anybody's else" ^{46/};

So, you will consider the evidence about to be offered for a limited purpose. It is not to be considered evidence of criminal character. It may be considered as probative on the issues of knowledge, intent, preparation, plan, absence of mistake or accident in respect to such of the acts and transactions of Mahler as is established to your satisfaction beyond a reasonable doubt in this case. (Tr. II 740-741) [A. 122-123].

While the jury was pondering this, it heard the government explain that Mr. Mahler had been convicted more than ten years earlier "of giving false testimony to the SEC under oath and of conspiring to give false testimony under oath." ^{47/} The government next advised the jury that the other conviction,

^{45/} (footnote continued from page 30) charged." United States v. Kasouris, 474 F.2d 689, 692 (5th Cir. 1973); United States v. Leonard, 524 F.2d 1076, 1091-1092 (2d Cir. 1975). The trial court must make a preliminary determination whether the prior crimes are relevant enough to be admissible (see Rule 104(a), Fed. R. Evid.), but it is for the jury to decide their probative value by assessing whether the particular prior convictions are in fact "substantially similar" to the offense alleged.

^{46/} Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556 (1932); United States v. Puco, *supra*, 453 F.2d at 542 ("The average jury is unable, despite curative instructions, to limit the influence of a defendant's criminal record to the issue of credibility."); see also Mr. Justice Jackson's statement, concurring in Krulewitch v. United States, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

^{47/} Tr. II 742 [A.124]. See United States v. Mahler, 363 F.2d 673 (2d Cir. 1966).

also more than ten years old, involved "various stock frauds and stock fraud conspiracy."^{48/} The trial court then permitted the government to read into the record portions of a transcript containing Mr. Mahler's testimony in a case^{49/} the government did not then identify for the jury.

This reading, in which the two prosecutors assumed the roles of questioner and witness, consumed twenty-one pages of the transcript in this case (Tr. II 744-764) [A.126-147]. The jury heard about Bankers Intercontinental Investment Company, Limited; Florida Patsand; Broadwell Securities, Inc.; Charters & Company of Miami; Fibercraft Products; a Mr. Dermer; a Mr. Norman Babat; a Mr. Light; a Mr. Strump; a Mr. Kapplow; a Mr. Jack Einiger; Financial Distributors; Roth & Company; Friedman & Company; and Underwriters Trust Company of New York City. Throughout the reading, these individuals and companies appeared in connection with broker's arrangements to sell stock and receive cash payments in return, plans to manipulate pink sheets, plans to share profits between brokers and salesmen, tax problems with cash payments, cash payments to salesmen, maintaining markets for stock, concealing transactions and principals on company books, commissions to salesmen, concealing information from customers, and backdating order tickets. Within this welter of names, dates,

^{48/} Tr. II 743 [A.125]. See United States v. Light, 394 F.2d 908, 910 n. 2 (2d Cir. 1968). With respect to each of the convictions, the government introduced the indictments and the judgments of conviction. Tr. II 741-744 [A.123-126].

^{49/} United States v. Light, *supra*. The defendant also objected to this manner of proof (Tr. II 666).

transactions and plans, the jury heard Mr. Mahler's past testimony that he was convicted of conspiring to give false testimony to the SEC, that he pleaded guilty to conspiracy to sell stock by fraudulent means and that he pleaded guilty, for a company named Broadwell Securities, to some other unidentified charge.

In its brief before this Court, the government will doubtless condense the events described in those twenty-one pages, eliminate the long cast of actors, explain the bewildering array of dates and transactions, interpret and summarize the testimony and attempt to relate all this to the complicated facts of the instant case. But no matter how accurate and succinct the government's recitation before this Court, it will not fairly represent what the jury had before it here. Rather than a clear and concise presentation, which might have guarded against the jury's improperly considering the prior conviction evidence, the government threw up a cloud of confusion. Indeed, the testimony the government read to the jury was about the sequence of events in United States v. Light, supra, a case this Court itself described as so "complex" that it was appropriate for the trial judge to perform the "monumental task of summarizing the large volume of evidence" in order to aid the jury's understanding and to prevent his charge from becoming "unwieldy and confusing." United States v. Light, supra, 394 F.2d at 911.

Our point here is not that the government's evidence contained in these twenty-one pages was wholly lacking in probative value.^{50/} It is rather that the reading of this prior

^{50/} Although the very age of the convictions substantially lessened their probative worth. See United States v. Carter, (footnote continued on page 34)

testimony generated such confusion that it served to maximize the prejudicial impact of the prior convictions and diminish whatever evidentiary value they might have had. Rule 403 of the Federal Rules of Evidence, which we set forth in the margin,^{51/} was violated not only because of the "dangers of unfair prejudice," but also because of the "confusion of the issues" this proof entailed. Perhaps in a simpler case the matter would have been one for the trial court's sound and reasoned discretion. But here this complex mass of evidence was inserted in a case that Judge Frankel described at the first trial as "already cumbersome and complicated and difficult for both judge and jury to follow. . . ." (April 11, 1977 Tr. 53). Still worse, its introduction occurred after a supposed limiting instruction that, as we have discussed above, compounded the resulting prejudice and confusion and further demonstrated the trial court's failure to heed the standards of Rule 403.^{52/}

50/ (footnote continued)

516 F.2d 431 (5th Cir. 1975); 1 Weinstein's Evidence ¶ 404[09], at 404-48 ("the ten year time limit of Rule 609(b) will, of course, be much too long in many instances when other crimes are admissible under Rule 404.").

51/ Rule 403, Fed. R. Evid., provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See McCormick on Evidence, supra, at 453-454.

52/ The Advisory Committee's Note to Rule 403, Fed. R. Evid., instructs:

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.

(footnote continued on page 35)

In these circumstances, it will be no answer for the government to rely on the trial court's discretion in such matters. Long ago, Mr. Chief Justice Marshall warned that matters within a court's discretion are not left to its "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." United States v. Burr, 25 F.Cas. 30, 35 (C.C. Va. 1807).^{53/} In this case, rather than a considered judgment by the trial court, reflecting sensitivity to the legal principles involved, the record reveals nothing but the trial court's inclination to permit the government's use of the disputed evidence. Rather than a reasoned decision, the trial court issued only a conclusion.^{54/} We have, then, a case quite

52/ (footnote continued)

The Advisory Committee's Note to Rule 105, Fed. R. Evid., further states:

The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. [Emphasis added.]

There is nothing in the record in this case to indicate that the trial court engaged in the kind of careful deliberation the Advisory Committee intended.

53/ Quoted in Albermarle Paper Co. v. Moody, 422 U.S. at 405, 416 (1975); see also McCormick on Evidence, supra, at 453-454.

54/ The trial court said only (Tr. II 670) [A.120]:

In my judgment, the tendency to confuse the issues or inflame the jury is virtually nil in a case of this kind and with respect to the kind of evidence that's being offered here.

The array of evidence in this case so far as I have seen it and examined the exhibits as they have come in leads in a practical balancing of the intangibles, to favor the probative worth of the evidence against the danger of prejudicial confusion, and accordingly, I will permit the government to proceed as it has indicated.

The court ordered that the transcript be redacted to contain only Mr. Mahler's testimony (Tr. II 670-671, 743-744) [A.120-121, 125-126].

unlike United States v. Robinson, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), in which the trial judge "carefully considered arguments of counsel and weighed the competing interests before admitting the evidence. . . ." Instead, the situation presented here closely resembles United States v. Dwyer, 539 F.2d 924, 928 (2d Cir. 1976), in which this court reversed a conviction because of the trial judge's failure to demonstrate his adherence to the standards of Rule 403.^{55/} On this ground alone, the Court should reach the same result in this case.

C. The Trial Court Violated Rule 609(b),
Fed. R. Evid., By Allowing the Govern-
ment to Use Convictions More than Ten
Year Old For Impeachment

When defendant Mahler took the stand, the trial court allowed the government to impeach him with his prior convictions for testifying falsely before the SEC and conspiracy to do so, and for committing various stock frauds and stock fraud conspiracy (Tr. II 1421-1423) [A. 227-229]. As indicated above, these convictions had previously been introduced for the limited purpose of proving prior similar acts in the government's direct case. The trial court's ruling permitting the government to use this evidence for the additional purpose of impeachment violated the express terms of Rule 609, Fed. R. Evid.

All of these convictions occurred, as did defendant's

^{55/} See United States v. Robinson, 174 U.S. App. D.C. 224, 229, 530 F.2d 1076, 1081 (1976); 1 Weinstein's Evidence ¶ 403(02), at 403-14 -- 403-15 (1975); 1 Wigmore, Evidence § 29, at 414 (3d ed. 1940).

release from confinement for the convictions, more than ten years before the instant trial.^{56/} Yet under Rule 609(b), Fed. R. Evid., evidence of convictions more than ten years old is not admissible for impeachment purposes. The only exception to this is if the trial "court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b), Fed. R. Evid. (emphasis added). The trial court made no such determination here. Indeed, the trial judge clearly ignored Rule 609(b) when he ruled, in response to Mr. Mahler's pretrial motion to exclude the prior convictions on impeachment, that the "substance of this motion was considered and rejected at the previous trial and there are no new facts which warrant any changes in the ruling."^{57/} A mere glance at Rule 609(b) would have revealed that a new fact, crucial under the rule, had developed since the first trial: as Mr. Mahler's motion specifically noted, ten years had elapsed from Mr. Mahler's release from confinement, thereby invoking the Rule 609(b) bar.

With respect to Rule 609, the Senate Judiciary Committee Report concluded that "convictions over ten years old generally do not have much probative value" and, in light of the

^{56/} The judgments of conviction on the SEC charges were entered on February 9, 1967 (Tr. II 742) [A.124]; and on the stock frauds, on January 26, 1967 (Tr. II 743) [A.125]. Mr. Mahler was released from confinement under each of these convictions on June 18, 1967 (Tr. II 1319). This trial began October 11, 1977.

^{57/} See Order of October 8, 1977, entered on Mr. Mahler's Motion to Grant an Order Precluding the Government from the Use of Prior Convictions for Impeachment; [R. Doc. 83; A.49-50]. See also R. Docs. 71, 73.

severe prejudice from such evidence, "[i]t is intended that convictions over ten years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial effect."^{58/}

The trial court here made none of the specific findings required by Rule 609(b); indeed, the court made no findings whatsoever regarding the particular facts and circumstances of this case.^{59/} Cf. United States v. Smith, 179 U.S. App. D.C. 162,

^{58/} S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974) (emphasis added). The House version of Rule 609 would have allowed no exceptions to the ten-year bar. H.R. Rep. No. 93-650 93d Cong., 1st Sess. (1973). In Gordon v. United States, 127 U.S. App. D.C. 343, 347-348, 383 F.2d 936, 940-941 (1967), then Judge, now Chief Justice, Burger outlined the relevant considerations in deciding whether a prior conviction should be admitted for impeachment. A court should consider the bearing of the prior conviction on credibility, the nearness or remoteness in time of the prior conviction, the defendant's conduct since the time of the prior convictions and the similarity of the past offenses to the one charged. The court stated that "[a]s a general guide, those convictions which are for the same crime should be admitted sparingly."

^{59/} The factual determination requirement under Rule 609(b) should be "sufficiently detailed and exact to indicate the factual basis for the District Court's ultimate conclusion," the same standard required under Rule 52(a), Fed. R. Civ. Pro. See United States v. Rohm & Hass Co., 500 F.2d 167, 177 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975). As this Court stated in Russo v. Central School District No. 1, 469 F.2d 623, 628 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973), statements "that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite close scrutiny"

This case is unlike United States v. Cohen, 544 F.2d 781 (5th Cir. 1977), in which the "court had the Rule before it" and "sufficient evidence in the record indicat[ed] that the trial judge made a thorough and thoughtful analysis of the issue." 544 F.2d at 785.

171 n. 17, 551 F.2d 348, 357 n. 17 (1976); United States v. Dwyer, supra, 539 F.2d at 927-928; United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976). Instead, the trial judge admitted the evidence over defendant's objection without even pausing to consider the propriety of his ruling.^{60/}

These were not inconsequential errors committed by the trial court. The impact of impeachment by prior crimes is always devastating and the government here was intent upon using this proof in both the first trial and the retrial. The court's disregard of Rule 609(b) requires that defendant Mahler's conviction be reversed. See United States v. Thorne, 547 F.2d 57, 58 (8th Cir. 1976) (per curiam) (1952 convictions clearly inadmissible under Rule 609(b)); United States v. Carpio, 547 F.2d 491, 493 (9th Cir. 1976) (use of 11 year old felony conviction clearly prohibited under Rule 609(b)).

II.

THE PARTIALITY OF THE TRIAL COURT AND ITS ACTIONS CAST SUCH SERIOUS DOUBT ON THE FAIRNESS OF THE TRIAL THAT THE CONVICTIONS MUST BE REVERSED

In a jury trial, a judge is not confined to being simply a moderator. While he must remain impartial, he may assume a

^{60/} Defense counsel reiterated at trial that the convictions were more than ten years old (Tr. II 664) and objected to their use as impeachment (Tr. II 1421-1422) [A. 227-228]. The trial court's total response to the objection was "Objection Overruled" (Tr. II 1422) [A. 228], despite the fact that Rule 609(b) quite plainly puts the burden on the proponent of the evidence -- here, the government. See remarks of Rep. William Hungate during the House debate on the Conference Report, 120 Cong. Rec. 40891 (1974). See also United States v. Smith, 179 U.S. App. D.C. 162, 175, 551 F.2d 348, 361 (1976) (government has burden of showing probative value outweighs prejudicial impact under Rule 609(a)). Defense counsel also objected to the form of the impeachment questions. (Tr. II 1421-1422) [A. 227-228].

more active role by examining or cross-examining witnesses in order to clarify issues or maintain proper direction of the trial. But when he does so, he must observe special precautions and be sensitive to the rights of the accused. The judge's "intervention should not become the rule." United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971). Accord, United States v. Switzer, 252 F.2d 139, 144 (2d Cir.), cert. denied, 357 U.S. 922 (1958). When he intervenes, the judge must never "give the jury the impression of partisanship or the impression that he believes one version of the evidence and disbelieves or doubts another." United States v. Grunberger, 431 F.2d 1062, 1067 (2d Cir. 1970); United States v. Gugliemini, 384 F.2d 602, 605 (2d Cir. 1967); United States v. DeSisto, 289 F.2d 833, 834 (2d Cir. 1961).

It is counsel's function, not the court's, to attack or bolster a witness' credibility. "[A] judge's participation during trial -- whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct -- must never reach the point at which it appears clear to the jury that the court believes the accused is guilty." United States v. Nazzaro, 472 F.2d 302, 303 (2d Cir. 1971); United States v. D'Anna, supra, 450 F.2d at 1206. If a trial judge, by his questions, rehabilitates a prosecution witness whose credibility has been undermined by defense counsel or injects doubt or uncertainty concerning the credibility of a defense witness, he has not merely assumed the prosecutor's role and overstepped the bounds of propriety. He has as well usurped the role of the jury and, in the process, jeopardized the defendant's right to a fair trial. United States v.

Nazzaro, supra, 472 F.2d at 307-308; United States v. Grunberger, supra, 431 F.2d at 1067; United States v. DeSisto, supra, 289 F.2d at 834.

In short, as this Court has stated:

Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. United States v. Brandt, 196 F.2d 653, 656 (2d Cir. 1952).^{61/}

These dangers are even greater when, as in this case, the factual presentation at trial is very complex, thus making the jury still more susceptible to influence by the authority represented by the trial court.

Any argument regarding a court's conduct of the trial must, of course, be made on the basis of the "cold black and white of a printed record." United States v. Nazzaro, supra, 472 F.2d at 304; United States v. Grunberger, supra, 431 F.2d at 1067; United States v. Ah Kee Eng, n. 61, supra, 241 F.2d at 161. Yet the printed record fails to convey the tones of voice, the facial expressions, the gestures and the general atmosphere so important in determining whether the trial court crossed the line between neutral assistance and impermissible participation. United States v. Weiss, 491 F.2d 460, 468 (2d Cir.), cert. denied, 419 U.S. 833 (1974). Even a chronological account, noting the trial

^{61/} See also United States v. Grunberger, supra, 431 F.2d at 1068, quoting Quercia v. United States, 289 U.S. 466, 470 (1933). The trial court "must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings." United States v. Ah Kee Eng, 241 F.2d 157, 161 (2d Cir. 1957).

judge's interruptions, questions and comments as they occurred, could not recreate the courtroom scene and the impact of the judge's conduct on the jury. Nevertheless, "[a] claim of unfair judicial conduct, under these circumstances, requires a close scrutiny of each tile in the mosaic of the trial so that we can determine whether instances of improper behavior or bias, when considered individually or taken together as a whole, may have reached that point where we can make a safe judgment that the defendant was deprived of the fair trial to which he is entitled." United States v. Nazzaro, supra, 472 F.2d at 304.^{62/}

In this section, we will therefore discuss the trial court's approach to the case, as disclosed by its pretrial actions, and then contrast the court's behavior during presentation of the government's case with that during the defense case, identifying certain types of conduct this Court has found to be particularly inappropriate and prejudicial in its decisions ordering reversals for new trials on the grounds raised herein. E.g., United States v. Nazzaro, supra; United States v. Grunberger, supra; United States v. Guglielmini, supra; United States v. DeSisto, supra; United States v. Ah Kee Eng, n. 61, supra; United States v. Brandt, supra. In so doing, we will cite examples of each type of conduct occurring in this trial, and invite the Court's attention to the Appendix, in which many of the pages

^{62/} This Court has indicated that when there is any substance to a claim of partiality by the trial court it will read and examine the entire trial transcript. United States v. Weiss, supra, 491 F.2d at 468; United States v. Guglielmini, supra, 384 F.2d at 605. We encourage the Court to do so in this case.

of the transcript demonstrating the trial court's improper intervention are compiled [A. 57-236]. We will then discuss the trial court's handling of the requests for jury instructions, which further indicates its partiality.

(1) The superseding indictment and proceedings before trial.

After the mistrial in May 1977, this case was called for trial on October 3, 4 and 5, but Judge Pollack was engaged in another trial. On October 4, 1977, the government filed a superseding indictment, No. S76 Cr. 1047 [A. 35-44], and had this served upon the defendants on October 5. They were arraigned that same day. See Oct. 6, 1977 Tr. 9; Motion for Continuance and for Leave to File Motions at ¶¶ 4-5 [R. Doc. 84; A. 51-55].

On October 6, 1977, Mr. Mahler's counsel^{63/} orally requested a continuance of the trial to enable him to prepare motions addressed to the new indictment and to prepare for trial on it (Oct. 6, 1977 Tr. 9-10). The government offered no explanation regarding why it had belatedly sprung a superseding indictment on the defendants, some 131 days after the mistrial on the original indictment. The trial court did not even inquire. Instead, the court admonished Mr. Mahler's counsel for even making the request:

^{63/} At that time Mr. Mahler was represented by court-appointed counsel. Counsel retained by Mr. Mahler's family entered their appearance for Mr. Mahler on October 11, 1977. See Oct. 11, 1977 Tr. 2-5 [R. Doc. 98].

[T]he statement that you are making is utter nonsense. The superseding indictment is a streamlined version of the old indictment so as to make perfectly clear what was already clear but prolix in the old indictment. There was absolutely nothing new in the thing at all, and any application of this sort is of a dilatory character. (Oct. 6, 1977 Tr. 10.)^{64/}

The court went on to indicate that it was itself familiar with the case, noting:

There is a 7,000 page record. There isn't anybody in this courtroom in connection with this case that doesn't know what it is all about from stem to stern, and we are going to go to trial no matter how many motions and how much delaying effort is put in by anybody. So if you need a formal statement, your motion for a continuance on this newest ground is denied. (Oct. 6, 1977 Tr. 11.)^{65/}

^{64/} While the government will, no doubt, make the same argument regarding the two indictments, we respectfully submit that comparison shows them to be substantially different. See A. 14-34, 35-44.

^{65/} The trial court also had the "benefit" of a 53-page prosecution memorandum given to it before trial, in which the government described what it hoped to prove at trial. Accompanying this memorandum was a "cover letter" from the prosecutor to the trial court explaining that the government would not provide copies of the memorandum to defense counsel, purportedly because at the first trial "most of the defendants took the stand and, having seen the Government's case, proceeded to attempt to exculpate themselves by giving false explanations for their conduct carefully tailored to the Government's proof," and that "[i]t would be naive not to assume that the defendants will once again attempt to escape justice at the retrial by giving perjurious testimony" thus leaving "the Government defenseless in the face of the defendants' lies." A copy of the "cover letter" was provided to Mr. Mahler's court-appointed attorney who, incredibly, interposed no objection to either the "cover letter" or the ex parte memorandum. We note in that connection that Mr. Mahler had made repeated motions to have this attorney replaced on the grounds that he was not providing effective assistance of counsel. E.g., see R. Docs. 64, 69, 74. As noted above (see n. 63, supra), retained counsel for Mr. Mahler entered their appearance on the morning trial commenced, October 11, 1977.

Counsel for Appellant Mahler have recently been provided an opportunity to read the "cover letter," and the memorandum, which (footnote continued on p. 45)

Mr. Mahler followed his oral request for a continuance with a written request [R. Doc. 84, A. 51-55]. This motion pointed out that the Federal Rules of Criminal Procedure guaranteed a defendant a reasonable opportunity following arraignment to file motions and objections to the indictment. Motion for Continuance and for Leave to File Motions at ¶ 6 [R. Doc. 84, A. 51-55]. See Federal Rules of Criminal Procedure 7(d), (f); 12(b)(1), (2); 16(f). See also McGill v. United States, 121 U.S. App. D.C. 179, 181, 348 F.2d 791, 793 (1965). In particular, the motion requested that the defendant be permitted an opportunity to test the manner in which the new indictment was obtained, noting that certain of the defense counsel had charged before the first trial^{66/} that the grand jury was being improperly used by the government after the first indictment had already been returned. Motion for Continuance and for Leave to File Motions at ¶ 8 n. 2 [R. Doc. 84, A. 51-55]. See, e.g., United States v. Fein, 504 F.2d 1170 (2d Cir. 1974).^{67/} The motion further pointed

^{65/} (footnote continued)
is still under seal (no docket entry even reflects its filing). We respectfully submit that this one-sided and argumentative memorandum -- replete with intemperate, inappropriate and scurrilous characterizations of the defendant and his background, legal arguments concerning evidentiary questions and speculation regarding the not guilty verdicts at the first trial -- could only have had the effect of biasing the trial court against Mr. Mahler before the trial even began. We have moved in the district court, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, to unseal this memorandum and transmit it, along with the "cover letter," to this Court as part of the record on appeal.

^{66/} See R. Docs. 18, 19, 21, 24, 25.

^{67/} The government has, by letter, refused to answer any questions of counsel for Appellant Mahler regarding the grand jury which returned the superseding indictment.

out that any delay resulting from the request for a continuance was attributable to the government's unexplained procrastination in obtaining a new indictment. Motion for Continuance and For Leave to File Motions at ¶ 9 [R. Doc. 84, A. 51-55]. On October 8, 1977, the trial court denied the motion (id., A. 56) depriving Mahler of his right under the Federal Rules of Criminal Procedure to file motions. In themselves, these actions of the trial court bordered on a denial of due process of law. See Ungar v. Sarafite, 376 U.S. 575, 589 (1964); Shirley v. State of North Carolina, 528 F.2d 819, 822-823 (4th Cir. 1975). Cf. United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975).^{68/}

Also before trial began, the court told counsel that during trial there would be no bench conferences for the discussion of objections or for any other purpose. Counsel could verbally object to questions, testimony or other evidence in only the most general of terms and would be heard by the judge concerning the reasons for their objections only through written memoranda. E.g., see Oct. 11, 1977 Tr. 7, 12 [R. Doc 98]. As a result of this extremely awkward procedure (see, e.g. Tr. II 126, 494-496, 949-950), which appeared to violate the spirit of Rule 103(c) of the Federal Rules of Evidence (see Advisory Committee's Note to Rule 103(c)), evidence that should properly have been excluded nonetheless came to the attention of the jury even when objections were sustained. See, e.g., Tr. II 462-464, 1453-1458 (see also n. 37, *supra*). It was in this atmosphere that the trial commenced.

^{68/} For reasons still not clear, the trial court even denied defendant's subsequent request, at the close of the government's case, to dismiss the superseded indictment (Tr. II 1164-1165).

(2) Conduct during the government's case.

As the record amply reveals, time after time the trial court intervened on behalf of the prosecution during presentation of the government's case. Sometimes it was to assist the prosecution in eliciting evidence from government witnesses (e.g., Tr. II 152-153, 280, 327-328, 330-332, 333-334, 379-380, 383-385, 472-474, 591-592, 628-629, 633-634, 1043-1047, 1072-1074, 1088); sometimes it was to put the prosecutor's questions in the appropriate form after defense objections, or to circumvent those objections (e.g., Tr. II 130-131, 278, 290-292, 294-295, 321-322, 377-378, 944, 1035-1036, 1049-1056); and often it was to rehabilitate or protect government witnesses, or to "score points" for the government in the midst of defense cross-examination (e.g., Tr. II 218-219, 225-226, 345, 347, 410-411, 466-467, 579, 829, 840-841, 853, 891-892, 908, 913-914, 918, 1032-1034, 1040-1041, 1053-1056, 1060, 1061-1062, 1091-1092, 1144-1145). [See A. 57-236.]

For example, having already interceded a number of times on the government's behalf during the direct examination of Bernard Herman (Tr. II 321-322, 327-328) [A. 81 - 82, 83 - 84], whose brokerage firm traded the 20,000 shares of Industries International stock for Mr. Mahler, the trial court interceded again to drive home the amount of money involved in the transactions (Tr. II 331-333) [A. 86-88] and then to assist the government in proving that the mails were used in the scheme alleged by the government:

Q. [MS. CHEPIGA] Mr. Herman, I show you what has been marked as Government Exhibit

284-E-1, 284-E-2 and 284-E-3. Could you identify these documents for the ladies and gentlemen of the jury?

A. These were checks issued by Saxon Securities on securities in payment, in settlement, payment of funds to the customer.

Q. And these checks were sent to Acquisitions and Investors?

A. That is correct.

Q. And they were sent in the mail?

A. I believe one of them was picked up. I don't recall which one.

Q. Referring back to Government --

THE COURT: What about the other two? Were they mailed in the regular course?

THE WITNESS: I have no other recollection and I would assume that it was mailed in the regular course of business.

Q. Directing your attention to the sales tickets that were marked as Government's Exhibit 284-C, could you explain to us the procedure by which the customer would be notified a sale was made?

A. The customer --

THE COURT: Do you send out confirmations of the transactions?

THE WITNESS: Yes.

THE COURT: Did you send out confirmations here?

THE WITNESS: In the normal course of business, yes.

THE COURT: Have you got the confirmations in front of you?

THE WITNESS: No, I do not.

Q. But it was your normal practice to send out through the mail confirmation of the sale?

A. That is correct (Tr. II 333-334)
[A. 88-89.]

Later, after the prosecutor had stated that he had no further questions of one of the government's witnesses, the court took it upon itself to emphasize for the jury the undisputed fact that Arnold Nelson Mahler also used the name Arnold Nelson:

MR. RAKOFF [the prosecutor]: I have no further questions, your Honor.

THE COURT: You have been asked questions by Mr. Rakoff which you responded with the name Nelson. He asked you some questions with the name Mahler. Are they different people are [sic] the same person in what you have been testifying to?

THE WITNESS: They are the same person, but at the time of the questions, I knew Mr. Mahler as Mr. Nelson.

THE COURT: You did not know he was Mahler?

THE WITNESS: I can't say at what point in time I knew he was Mr. Mahler.

THE COURT: When he spoke with you, did he identify himself as Nelson?

THE WITNESS: Yes.

THE COURT: Any further questions? (Tr. II 591-592) [A. 114-115.]^{69/}

In another instance, when a prosecution witness testified only that the condition of the corporation alleged to be part of the scheme to defraud was "not good," the court made sure the jury knew it was insolvent:

THE COURT: What do you mean by "not good?"

THE WITNESS: They had many obligations against the company that they were having difficulty meeting.

THE COURT: They couldn't meet their obligations. What about their assets, if any?

THE WITNESS: They had assets but those were somewhat limited.

THE COURT: Were the assets less than the liabilities?

THE WITNESS: Yes, from the information I had.

THE COURT: The company was insolvent on a going concern basis, isn't that right?

THE WITNESS: I believe that to be the case. (Tr. II 628-629) [A. 116-117.]^{70/}

Likewise, the trial court frequently intervened to assist the government after defense objections. For example, after the prosecutor had twice attempted to characterize a witness' testimony as showing a sale prearranged "both as to price

^{69/} See also Tr. II 410-411, 1225 [A. 99-100, 210].

^{70/} The trial court also permitted the prosecutor to ask government witnesses one leading question after another (e.g., see Tr. II 161-169) [A. 61-69].



and as to broker who would buy it" (Tr. II 292-293) the following took place:

MR. JANIS [counsel for Mr. Mahler]:
Objection.

THE COURT: Sustained.

Was the transaction arranged in advance by anybody?

THE WITNESS: Yes, it was.

THE COURT: How was it arranged?

THE WITNESS: We just delivered the stock over to the broker and we told him who the broker was that was going to buy the stock from him and to sell the whole block of 40,000 shares at one time.

THE COURT: Was price mentioned?

THE WITNESS: Yes, a half a dollar a share.

THE COURT: Was that pursuant to any prior arrangement?

THE WITNESS: Yes, it was.

THE COURT: Between whom and whom?

THE WITNESS: I called up the broker and I told him -- Lou came to me originally and told me Marty Greenberg, the president of Bell-Ko was going to sell the stock to Arnie Nelson and Teddy Zucker and in order for him to do this, they had to have a prearranged sale without anybody knowing about it. So, Lou asked me to get him a broker and I called up Potter and I asked him to go on the sheets for us and he will earn the commissions and all he had to do was sell it to another broker.

THE COURT: For what reason was it necessary to have a prearranged sale so that Greenberg could sell his stock?

THE WITNESS: The stock was unregistered and by selling it without being prearranged, it would free up the stock. It would be clean stock.

MR. JANIS: Your Honor, I object to that. I ask that answer be stricken. I think as a matter of law it's incorrect.

THE COURT: As a matter of law, you can argue law at a different time, but that's this witness' testimony.

Go ahead, Miss Chepica. (Tr. II 294-295 [A. 79-80.]

The trial court repeatedly interrupted cross-examination of government witnesses to rehabilitate or protect them or to

"score points" for the prosecution. In one instance, counsel for Mr. Mahler was attempting to show in cross-examination of a government witness, Mr. Zucker, that certain stock had value. After the witness had indicated that the stock did have value, but that he could not recall the amount, the judge intervened as follows:

Q. [MR. SHARP]: What was the value of the stock at the time you agreed to make that guarantee?

A. I don't recall.

Q. You don't recall on March 7th what it was?

A. I don't know if we signed this March 7th, as I said before.

THE COURT: Did the stock have any value in fact?

THE WITNESS: Your Honor, I am not sure if I signed it on March 7th.

THE COURT: Did Industries International have any value in fact? You are talking about market price, I am talking about value.

THE WITNESS: It had small value. (Tr. II 891-892) [A. 152-153.]

In another instance, counsel for Mr. Mahler was attempting to show in cross-examination of the government's witness, Mr. Zucker, that Mr. Mahler sold out his interest in Jefferson Retread to the witness' wife on April 1, 1973 (before a payment at issue was made by that company; see pp. 13-14, supra), and that this was the date indicated on a document evidencing the sale. Again, "the judge came all too quickly to the aid of a prosecution witness during cross-examination," United States v. Nazzaro, supra, 472 F.2d at 308:

Q. [MR. SHARP]: You say its undated?

A. Yes. No date on this.

Q. Isn't it April the 1st?

A. No, its undated April -- its a slash. I'm sorry, to me it appears undated. It was in April and it could have been the 1st.

Q. It appears to be April 1st and signed by your wife?

A. I think I didn't pay him for two weeks later.

Q. The document was signed on April the 1st though?

A. I said from the document I can't tell if its a one or a slash. It appears to be a blank date that can be filled in at a later date.

Q. Is that your wife's signature?

A. Yes.

THE COURT: Was it signed on a Sunday?

THE WITNESS: I don't believe so.

THE COURT: April 1st, 1973, happened to be a Sunday.

Q. Is that your wife's signature?

A. Yes that's my wife's signature.

THE COURT: You say it couldn't have been signed on Sunday?

THE WITNESS: It looks like a slash to me. Very often it was Mr. Nelson's custom for a date to be filled in, with a slash.

THE COURT: You didn't do it on Sunday?

THE WITNESS: I don't believe so, no.

(Tr. II 913-914) [A. 155-156.]^{71/}

In yet another instance, the court demonstrated its unwillingness to allow defense counsel's cross-examination of a government witness to end on a high note, and used the opportunity to drive home the government's allegations:

Q. [MR. JANIS]: Mr. Steinert, it would be fair to say, then, that a substantial number of public shareholders, individuals and corporations, of Bell-Ko made a substantial amount of money once the merger was completed, is that correct?

A. From the sale of the stock, yes.

MR. JANIS: I have no other questions.

^{71/} See also Tr. II 1061-1062 [A. 180-181]. This colloquy was similar in effect to that related in United States v. Nazzaro, supra, 472 F.2d at 307-308, concerning which this Court said: "There were numerous similar instances in which the judge came all too quickly to the aid of a prosecution witness during cross examination. The impact of these instances was such that the jury could only believe that the judge favored the government's witness and his version of the facts." Id. at 308.

THE COURT: Was it because the stock was in the pink sheets and was tradeable that a market price was established?

THE WITNESS: Absolutely, your Honor. There was no market before that. (Tr. II 1144-1145) [A. 186-187.]

The trial court disparaged defense counsel and interrupted testimony of witnesses during defense counsel's examination at many points during trial. For example, on cross-examination of the government's witness, Mr. Kulekofsky, counsel for Mr. Mahler attempted to draw attention to the fact that Kulekofsky was never indicted, prosecuted or sentenced for admitted prior wrongdoing, as a result of a "deal" with the prosecution in exchange for his testimony. The court interrupted and ridiculed defense counsel as follows:

Q. [MR. SHARP]: Mr. Kulekofsky, the arrangements that you made with the government, on the deal we discussed earlier, you were made to suffer a 5-year probationary period, isn't that right?

A. I don't consider the word "suffer."

Q. Do you consider it to be punishment sir?

A. It was an admission on my part that I did something wrong. It was an acknowledgment and it was a way of alerting the SEC that if I ever went back into the brokerage business I did something wrong at one time in my life.

Q. Indictment is a way of alerting a man to his wrongdoing, is that right?

A. Yes.

Q. Prosecution is alerting a man of his wrongdoing, isn't it?

A. Yes.

Q. Incarceration is a way of identifying to a man that he has committed an illegal act, isn't it?

MR. RAKOFF: Objection, Your Honor.

THE COURT: I think we have gone far enough on this. Death, I suppose is another way. (Tr. II 218-219) [A. 70-71.]

At another point, defense counsel began cross-examination of the "summary witness" called by the government at the

close of its case. The court abruptly cut off defense counsel from his legitimate line of inquiry in the following manner:

Q. [MR. JANIS]: Mr. Steinert, you have been called as a summary witness, is that correct?

A. Yes, sir.

Q. And that was the purpose of your testimony, to summarize the evidence to the ladies and gentlemen of the jury?

THE COURT: The purpose of the testimony is what appears to be the purpose from the evidence given and the Court permitted his testimony to be given. Go from that. (Tr. II 1091-1092) [A. 184-185.]

The impatience and annoyance of the trial judge in interrupting or ridiculing defense counsel was apparent.^{72/} Each hostile interjection conveyed the impression that the judge thought defense counsel were wasting their own time and the time of the judge and jury. In this manner, the judge's conduct continued to shift the balance with the jury against the defendant.

(3) Conduct during the defendant's case.

In stark contrast to its assistance to the government, the trial court never intervened on behalf of the defendants. On the contrary, its frequent interventions during the defense case were always calculated to undermine the credibility of defense witnesses or to assist the government in cross-

^{72/} The acrimony of such exchanges with counsel in the presence of the jury reinforces our conclusion that Mr. Mahler was denied a fair trial. See United States v. Nazzaro, *supra*, 472 F.2d at 311; United States v. Ah Kee Eng, *supra*, 241 F.2d at 161. See also Tr. II 226, 345, 466-467, 579, 1060 [A. 73, 90, 104-105, 113, 179].

examination.^{73/} Nowhere is this more evident than during the testimony of Mr. Mahler's first -- and probably most important -- witness, Mr. Charles J. Hecht.

From the very beginning of Mr. Hecht's testimony, the court's predisposition was manifest and it often "assumed the prosecutor's role." United States v. Nazzaro, supra, 472 F.2d at 308. Thus, as the witness was recounting his background, the following occurred:

Q. [MR. JANIS]: After your graduation from law school did you engage in the practice of law in New York City?

A. Yes, I did. I went in the Army first --

THE COURT: He didn't ask you that. Just answer the questions. (Tr. II 1169-1170)
[A. 188-189.]^{74/}

Shortly thereafter, the court interrupted direct examination in an obvious attempt to discredit the witness by attempting to show he had a conflict of interest:

Q. [MR. JANIS]: Did you have occasion to speak to [Mr. Mahler] when you first agreed to represent him about the background?

A. Yes, I did.

Q. Did you ask him if he ever had any trouble with the SEC?

A. I asked him generally -

THE COURT: Just answer the question.

A. Yes.

Q. And did he give you a response?

A. Yes, he did.

Q. What was his response?

A. He explained to me that he had been enjoined by the SEC and it was done under his

^{73/} This court has specifically admonished that persistent questioning by the trial court, particularly when such questioning is intended to undermine the witness or indicate the trial court's disbelief, is highly improper. E.g. United States v. Nazzaro, supra, 472 F.2d at 308, 309.

^{74/} See also Tr. II 1173, 1196, 1205 [A. 190, 198, 201].

name Mahler and was called Broadwall Securities, and I checked the case, and he also said that he had a prior criminal conviction back in the mid '60s relating to payments to brokers.

Q. Notwithstanding that or after you learned that you agreed to represent Mr. Mahler?

A. Yes. I reviewed the case. So long as he dealt with me in a proper manner I had no problem.

Q. Tell us briefly about the type of business --

THE COURT: Were you in the SEC when these cases were pending?

THE WITNESS: No, not at all, your Honor. Which case?

THE COURT: The case against Mr. Mahler.

THE WITNESS: No. I understand it was a completely different office out of New York and I was down in Washington in corporate finance.

THE COURT: You were in corporate finance in '67, '68 and '69?

THE WITNESS: Yes.

THE COURT: And you say your division had nothing to do with the case?

THE WITNESS: Against him, no. It is not an enforcement division.

THE COURT: I know what kind of a division is. I ask you whether you personally had any connection with it.

THE WITNESS: No, I had never heard of him.

Q. Mr. Hecht, just to clear that up, you were operating in Washington, is that correct?

A. Yes.

Q. These cases were brought in New York, is that right?

A. That's my understanding.

Q. They were brought in 1965, is that correct?

A. It is reported in the case books that is when the case was actually tried. I don't know when it was brought.

Q. That was at least two years or so before you began to work for the SEC?

A. About a year and a half. (Tr. II 1173-1175) [A. 190-192.]^{75/}

While Mr. Hecht was testifying about legitimate business reasons for a private company and a public "shell" to merge, a

^{75/} See also Tr. II 1189-1190 [A. 196-197].

crucial issue in the defendant's case, defense counsel asked him if he knew of any public corporations that had gone public that way (Tr. II 1181) [A. 194]. Mr. Hecht responded yes and named two well known corporations. Id. The trial court, not content to wait for the prosecutor's cross-examination, interrupted the direct examination to ask Mr. Hecht: "What were the assets of those companies before they went public that way?" Mr. Hecht's answer, in part, was "well over a million." Id. Thus, by a well-timed question eliciting a response that highlighted the different circumstances of this case, the court sought to deal a blow to the case the defendant was trying to build. The court had again "assumed the prosecutors' role," and signaled to the jury that the defendant's case was not worthy of belief. United States v. Nazzaro, supra, 472 F.2d at 308.

While the trial court's hostility toward the defense was apparent on direct examination of Mr. Hecht, it became even more so on cross-examination. For example, the prosecutor's cross-examination began as follows:

Q. [MR. RAKOFF]: Mr. Hecht, when you first went to work for the various companies that Mr. Mahler was putting together, the two companies that he had and so forth, he told you about one of his prior convictions, is that it?

A. Well, he explained -- he didn't --

THE COURT: Answer the question.

THE WITNESS: He didn't say prior conviction. He said he had a prior criminal problem when he had been sentenced and he spent some time in prison. He explained the facts surrounding the conviction. I don't know whether it was one or two.

Q. Stock fraud?

A. It was related to stocks. It wasn't a stock fraud the way I understand it.

Q. It was not a stock fraud?

A. I understood it was the payment of cash to brokers was the substance of the government's allegations. That's what he explained to me.

THE COURT: Is that a stock fraud?

THE WITNESS: I don't know, because I don't know the circumstances.

THE COURT: You don't know whether payment to brokers is a stock fraud?

THE WITNESS: It could be, your Honor, if it is a payment to your employees. That's the way he explained it to me. He was paying some of his employees in cash instead of checks.

THE COURT: Is that a stock fraud?

THE WITNESS: No, I don't know if that is a stock fraud. That may be a fraud on the taxes with respect to the employees not reporting income. (Tr. II 1198-1199) [A. 199-200.]

Still another example of the trial court's hostility to the defense and assistance to the government occurred a few moments later in the cross-examination:

Q. [MR. RAKOFF]: I show you the one [proxy statement] that was prepared in connection with HUP and the name of the shell there was M-Tec, and let me ask you, would it have been necessary under the fraud laws to reveal who controlled the shell corporation if it was in the control of one or more -- one or a few individuals?

A. With respect to the dormant publicly held company, you should disclose who is the actual record or beneficial owner of at least 10 percent of the stock.

THE COURT: In simple terms, just answer the question. Do you have to reveal who is in control of the shell, yes or no?

THE WITNESS: Yes, but there is specific test for control, your Honor, under the law.

THE COURT: That is a different question that you haven't been asked. You have to reveal who is in control?

THE WITNESS: Yes, of the shell. (Tr. II 1208) [A. 202.]^{76/}

^{76/} See also Tr. II 1209, 1211-1212, 1215-1216 [A. 203, 204-205, 206-207].

The court continued in this vein on redirect examination of Mr. Hecht, and "interrupted the orderly presentation of evidence by the defense" so as "to underline inconsistencies in the positions or to elicit admissions bearing on the credibility of defense witnesses." United States v. Brandt, supra, 196 F.2d at 656 (footnotes omitted). For example, the court gratuitously interrupted the witness to emphasize Mr. Mahler's use of two names, saying "You weren't calling him Nelson six months ago, were you?" (Tr. II 1225) [A. 210]. Moreover, when defense counsel sought to establish that the proxy statements used by the government for cross-examination contained statements that put the public on notice of the perhaps shaky financial condition of the companies involved (Tr. II 1225-1229) [A. 210-214], the court once again intervened for the prosecution:

Q. [MR. JANIS]: Does it not put the public on notice that this may in fact be a poor investment?

A. Well, that's a value judgment. You would have to look, and I haven't read it, this is the first time I have looked at the transaction, you have to look at the entire statement. You would have to look at their financial statements, you would have to look at their income statement. Maybe this company has a substantial balance sheet so they would get financing. You would have to look at the whole document.

THE COURT: Suppose it didn't have substantial assets; suppose it was virtually insolvent. Would it be appropriate to have those statements in a proxy?

THE WITNESS: Yes, it would because you are putting them on notice.

THE COURT: You think those things that have been read to you is notice you are dealing with two insolvent companies?

THE WITNESS: I didn't say that, your Honor. I say you look at the balance sheet.

MR. BLACKSTONE: [counsel for Mr. Ubben]: Your Honor, I object to your question. It assumes a fact in issue.

THE COURT: I am not referring to this particular statement. I am asking a question as to what this witness would regard to be appropriate to say if he knew that the two companies being put together were virtually penniless.

THE WITNESS: I think I would put it I did it a little differently. I put up a risk factor.

THE COURT: Never mind how you did it. I ask you whether thos [sic] disclaimers are appropriate under a Rule 133 filing with the intention to immediately trade stock.

THE WITNESS: No, if you have the intention to immediately trade stock they wouldn't be, because the stock should have some relation to the value of the underlying companies, and if the companies are, for all intents and purposes, valueless, then there is no basis for the stock trading at a substantial price. (Tr. II 1229-1231) [A. 214-216.]

After the conclusion of Mr. Hecht's testimony, counsel for Mr. Mahler objected and advised the court that as a result of its many interventions on the government's behalf during Mr. Hecht's testimony^{77/} the court had given the jury the impression that it believed the government's version of the case (Tr. II 1236-1238) [A. 217-219]. After consulting about this problem over the intervening weekend, counsel for Mr. Mahler renewed their objection and moved for a mistrial, arguing that the court's frequent intervention to rehabilitate government witnesses and to undermine defense witnesses had prejudiced Mr. Mahler's right to a fair trial (Tr. II 1241-1244) [A. 220-223]. The court denied this request, using the opportunity to berate defense counsel

^{77/} See also Tr. II 1177, 1186, 1196, 1198-1199, 1205, 1208-1209, 1211-1212, 1215-1216, 1221, 1223, 1225 [A. 193, 195, 198, 199-200, 201, 202-203, 204-205, 206-207, 208, 209, 210].

(Tr. II 1244) [A. 223].^{78/}

Notwithstanding counsel's earlier protests concerning the trial court's intervention during trial on the government's behalf, the court chose also to assist the government during its cross-examination of Mr. Mahler. The court's impatience with Mr. Mahler and its assistance to the prosecution, particularly when contrasted to its actions during cross-examination of government witnesses, was an obvious signal to the jury that the trial court felt that Mr. Mahler should not be believed. E.g., see Tr. II 1405, 1409, 1411, 1435, 1445-1446, 1458, 1472, 1473 [A. 224, 225, 226, 230, 231-232, 233, 234, 235]; see also n. 37, supra.^{79/}

^{78/} The trial court also stated that the witness should not have been allowed to testify on the law regarding shell transactions (Tr. II 1242-1243) [A. 221-222]. Quite aside from the fact that the witness' qualifications were more than sufficient to qualify him as an expert (see Tr. II 1169-1171), the trial court had itself suggested to both parties only four days earlier the need for just such a witness:

We will take a short recess. It occurs to me, gentlemen, that dealing in this sophisticated securities type matter, that either on direct or cross-examination somebody ought to trace out the mechanics of what occurs without the details of the transactions under scrutiny themselves.

In other words, there have been conversations here and this witness [Mr. Zucker] has testified to selling shell dealers [sic] and controllings [sic] the shell. While everybody present here, now that the jury has gone to recess, understands what is going on, you would think that in the interest of all concerned it would be important to in some way try to state what has been summarized by each of the witnesses as shell dealers and the marketing of stock in connection therewith. I merely throw that out as a suggestion. (Tr. II 811-812.)

The government offered no such testimony in its case.

^{79/} The prosecutor plainly (and quite understandably) took advantage of the trial court's demonstrated view of the case. Thus, referring to a question asked by the trial court of Mr. Mahler's (footnote continued on p. 61)

The instant trial was, in short, conducted by the judge in the same manner as United States v. Nazzaro, supra, an opinion of this Court worth quoting at length because it bears so directly on the question here:

It is clear from the record that on frequent occasions during the trial of this case, the judge's questions unmistakably rehabilitated a prosecution witness whose credibility had been undermined by defense counsel. At other times, the court's questions appeared designed to inject doubt or uncertainty as to the credibility of a defense witness.

* * *

The court's vigorous participation in examining [defense witnesses], especially when contrasted with the relative freedom from hostile interruption of the prosecution's witnesses, could not avoid conveying to the jury that the judge did not believe [the defendant] and the other defense witnesses. 472 F.2d at 307, 310 (footnote omitted).^{80/}

Such prejudice to the defendant's right to a fair trial cannot, as this Court has frequently held, be overcome by a charge

^{79/} (footnote continued)

wife, after the prosecutor had concluded his cross-examination (Tr. II 1495) [A. 236], the prosecutor in closing argument emphasized his point by reminding the jury of the imprimatur which the trial court had placed on the government's case:

How many weeks was that trip, Judge Pollack asked her.

Three weeks. Do you remember that? Just yesterday.

Three weeks. (Tr. II 1643.)

^{80/} See also United States v. Guqlielmi, supra, 384 F.2d at 605:

The trial judge's frequent participation in the trial, by questions and comments, also tended to give the jury the impression that he credited the prosecution and disbelieved the defense. . . . While the trial judge may, and indeed should, take an active part in the trial where necessary to clarify evidence and assist the jury, the persistent questioning the trial judge conducted in this case, together with his comments to defense counsel, conveyed to the jury far too strong an impression of his belief in the defendants' guilt.

See also United States v. Grunberger, supra, 431 F.2d at 1067-1068.

admonishing the jury that its view of the evidence controls.^{81/}
E.g., United States v. Nazzaro, supra, 472 F.2d at 312-313;^{82/}
United States v. Grunberger, supra, 431 F.2d at 1068; United
States v. DeSisto, supra, 289 F.2d at 835; United States v.
Brandt, supra, 196 F.2d at 656.

(4) Jury instructions.

That the trial court had become a member of the prosecution team is exemplified by its handling of the government and defense requests to charge. The government filed with the Court a complete Request to Charge (Court Exhibit 10) [R. Doc. 97], as did defendant Mahler (Court Exhibit 9) [R. Doc. 97]. The instructions requested by Mr. Mahler were, as noted on the cover page of the Request to Charge, "those given by the Honorable Marvin E. Frankel in the trial of the superceded indictment, 76 Cr. 1047, with Defendant Mahler's additions, deletions and

^{81/} The trial court instructed the jury as follows:
The function of believing or disbelieving testimony or exhibits and of accepting or rejecting inferences to be drawn from evidence lies squarely within your province. The Court holds and expresses no opinion as to the validity of any contentions made by the defendants or by the government. (Tr. II 1714) [A. 240].

^{82/} Finding that the error could not have been cured even if the trial judge's charge "had not been as cursory as it was," 472 F.2d at 313, the Court in Nazzaro stated that "[t]he extent of the charge on the judge's view was:

In the course of trial it has been necessary for me to rule on the admission of evidence and on motions made with respect to the applicable law. You must not infer from anything that I have said during the course of the trial that I hold any views for or against the defendant in this prosecution." 472 F.2d at 313 n. 11.
Compare the instruction given in the instance case, n.81, supra.

revisions noted on the transcript of those proceedings."^{83/} An index to the Request for Charge noted the pages on which particular instructions were to be found. Id.

On the morning on which the jury was instructed, the trial court, in violation of Rule 30 of the Federal Rules of Criminal Procedure, requested no argument concerning jury instructions, nor did it inform defense counsel that their Requests for Charge had been denied. Instead, the judge simply called the jury in and began the charge (Tr. II 1711) [A. 237]. It soon became apparent that the court had rejected the defense requests in toto and had embraced virtually the entire government charge. The charge, which was replete with "examples" embracing the government's theory, deemphasized the protections (such as presumption of innocence and proof beyond a reasonable doubt) accorded criminal defendants; referred to the defendants simply as "Mahler" and "Ubben;" failed adequately to advise the jury that the indictment was not itself evidence and, by dwelling upon it during the charge, gave it "a life of its own;" included incomplete or inaccurate statements of law;^{84/} and embraced the notion of the public deterrent effect of a guilty verdict (Tr. II 1752, 1788) [A. 278, 314].^{85/} A review of the instructions as a whole

^{83/} Those additions, deletions and revisions were not substantial and were, for the most part, designed to tailor the instructions to the new indictment and eliminate instructions concerning parties or questions not at issue at the second trial.

^{84/} For example, the court advised the jury that if the defendant was an aider and abetter, the jury "must" find the defendant guilty (Tr. II 1728; see also Tr. II 1792-1793) [A. 254, 318-319]. See note 85, infra.

^{85/} After the instructions were given, the trial court permitted counsel for Mr. Mahler to note their exceptions (Tr. II 1789) (footnote continued on p.64)

will demonstrate, we submit, that they were so grossly one-sided that they were tantamount to directing a verdict of guilty.^{86/}

What makes this all the more distressing is that the record reveals that the trial court did not even consider the requests made by Mr. Mahler's counsel. When counsel for Mr. Mahler began to note his exceptions to the trial court's charge, the following colloquy took place:

THE COURT: Are there any exceptions on the part of the defendant Arnold Nelson Mahler?

MR. JANIS: Yes, your Honor. It seems that somehow or another I always get elected for these tasks. We have many, many exceptions.

I think I can begin by stating that to the extent that the instructions departed from or omitted the requests that we made --

THE COURT: I have had no requests from the defendant Mahler at any time.

MR. JANIS: We submitted proposed instructions. We submitted the instructions of Judge Frankel.

THE COURT: You mean you submitted his charge?

MR. JANIS: That's correct.

We submitted that as a full and complete charge in this case, and we would state that to the extent the charge which the Court in fact gave departed from Judge Frankel's charge we note our exception.

Also we note --

^{85/} (footnote continued)

[A. 315]. We invite the Court's attention to the specific and detailed exceptions noted at that time (Tr. II 1789-1802) [A. 315-328]. Objections were made by reference to the instructions enumerated in the government's Request to Charge (Court Exhibit 10) [R. Doc. 97].

^{86/} The Supreme Court has accepted "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). It has also noted that "in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial." United States v. Park, 421 U.S. 658, 674 (1975); see United States v. Birnbaum, 373 F.2d 250, 257-259 (2d Cir.), cert. denied, 389 U.S. 837 (1967).

THE COURT: Just a minute. Where is the clerk?

(Clerk enters robing room.)

THE COURT: What is the next court exhibit?

THE CLERK: Court Exhibit 9.

THE COURT: Your request to charge Judge Frankel's charge is marked as Court's Exhibit 9.

(Court's Exhibit 9 was marked.)

MR. JANIS: Thank you. (Tr. II 1789-1791) [A. 315-317.]^{87/}

Quite apart from the fact that defendant Mahler's Requests to Charge were much more balanced than those actually given by the trial court,^{88/} they were certainly entitled at least to consideration, particularly since they represented the considered judgment of another district court judge sitting in the same case. Indeed, we respectfully submit that the charge which was given, particularly when coupled with the court's failure even to consider the defense requests to charge, in itself amounts to reversible error.^{89/}

^{87/} Later, the Court specifically conceded that it had not read the requested charge (Tr. II 1800) [A. 326]. Defendant's requests had been filed with the court as the first order of business on October 24, 1977, two days before the charge was given (Tr. II 1241) [A. 220].

^{88/} We hasten to add that we do not consider those instructions at all "pro-defense." On the contrary, we view them merely as much less "pro-government" than Judge Pollack's charge.

^{89/} In United States v. Birnbaum, supra, this Court noted that "a juror's perception of the judge's attitude concerning the case, assuming he has displayed one, will be influenced not only by what the judge says in his charge, but also by how the judge conducted himself from the outset of the trial." 373 F.2d at 257-258. Emphasizing that the defendant in that case made "no claim that his trial in chief was not fair or that the court failed to preserve an atmosphere of impartiality," id. at 258, and that "[t]he record fails to reveal any pattern of partiality toward one side and hostility toward the other," id. at 259, the Court affirmed the convictions although plainly it was somewhat troubled by the trial court's instructions. See id. at 258-259, 265. Chief Judge Lumbard dissented, noting that (as in the (footnote continued on p.66)

The argument contained herein is one which we did not lightly raise. We are not unmindful of the tremendous deference which this Court pays to district court judges when issues such as these are raised. But, having lived through this trial, we believe that even the cold record demonstrates that Mr. Mahler did not receive a trial in "a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." United States v. Brandt, supra, 196 F.2d at 655-656; see United States v. Nazzaro, supra, 472 F.2d at 312.^{90/} We respectfully submit that, taken together, the actions of the trial court "cast such a serious doubt on the fairness of the trial that the convictions must be reversed." United States v. Guglielmini, supra, 384 F.2d at 607. See United States v. Grunberger, supra, 431 F.2d at 1064; United States v. DeSisto, supra, 389 F.2d at 834; United States v. Brandt, supra, 196 F.2d at 655.

^{89/} (footnote continued)
instant case) "the judge at many points argued and emphasized the government's contentions. . . . and he argued the government's side of important bits of evidence." Id. at 265-266. Moreover, the trial court's charge was, in Chief Judge Lumbard's view, even more indefensible since "the trial judge had the benefit of the example of a charge in this very case upon the first trial." Id. at 265.

^{90/} We doubt, however, that the record can reveal just how coercive the atmosphere during trial was for the defendant and his counsel, or how difficult it was for counsel to continue to object and not to "have trimmed [their] sails to such a judicial wind as prevailed in the courtroom." United States v. Ah Kee Eng, supra, 241 F.2d at 161.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed.

Respectfully submitted,

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March 20, 1978

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellant Arnold Nelson Mahler and one copy of the Appendix for Appellant Arnold Nelson Mahler have been mailed by prepaid first class postage on this 20th day of March, 1978, to counsel for the government, Jed. S. Rakoff, Esq., Assistant United States Attorney, One St. Andrews Plaza, New York, NY 10007, and to counsel for Defendant Dean H. Ubben, David Blackstone, Esq., 401 Broadway, New York, NY 10013.

N. Richard Janis
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